Vol. I Pages from 1 to 40

ADVANCE SHEETS

OF

OPINIONS IN CASES

HEARD AND DETERMINED
BY THE

NORTH CAROLINA INDUSTRIAL COMMISSION

RALEIGH

OCTOBER, 1929

OPINIONS TO OCTOBER 1

SUBSCRIPTION PRICE $5.00 PER YEAR
IN ADVANCE

PUBLISHED FOR THE COMMISSION
BY
EDWARDS & BROUGHTON COMPANY
RALEIGH, N. C.

Admission applied for as second-class matter November 12, 1929,
at the post-office at Raleigh, North Carolina,
under the Act of March 3, 1879.

PUNCHED TO FIT BINDER SUPPLIED BY EDWARDS & BROUGHTON COMPANY, RALEIGH

INDEX

Case *Page*

Chancie Queen *v.* Clyde Mills et al. 1
Roswell Henninger *v.* Industrial Commission 3
Henry Hodges *v.* Rowland Lumber Company 5
J. A. Rudisill *v.* Rex Spinning Company et al. 7
Lonnie Helms *v.* Myers Mills et al. 9
Edward B. Yancey *v.* Boyland-Pearce Company et al. 11
Alfred L. Peterson *v.* Duke Power Company 14
Joe Grant *v.* J. E. Allen et al. 15
Willie B. Jones *v.* Reynolds Tobacco Company et al. 19
Wade O. Conrad *v.* Cook-Lewis Foundry Company et al. 20
George I. Thompson et al. *v.* State and Highway Commission 24
Tom Wilkerson *v.* Marion Veneer and Panel Company et al. 25
T. A. Hollifield *v.* Briggs-Shaffner Company et al. 26
James Curley *v.* Atlantic Bitulithic Company 28
E. D. Holtzclaw *v.* Carolina Mining Company et al. 30
Lawrence Montgomery *v.* Carolina Steel and Iron Works et al. 34
Junius H. Smith et al. *v.* Carolina Power & Light Company 35

NORTH CAROLINA INDUSTRIAL COMMISSION

MATT H. ALLEN, CHAIRMAN
J. DEWEY DORSETT
T. A. WILSON
COMMISSIONERS

E. W. PRICE, SECRETARY

ELEVENTH FLOOR RALEIGH BANK & TRUST BUILDING
RALEIGH, N. C.

[Docket No. 1]

CHANCIE QUEEN, Plaintiff, v. CLYDE MILLS, INC., Employer, and U. S. CASUALTY COMPANY, Carrier, Defendants

Filed September 3, 1929

Horseplay.—Where defendant fails to sustain burden of proof that accident was result of horseplay, and accident causing injury is found to arise out of and in the course of employment, compensation will be awarded.

Arising out of and in the Course of Employment.—Injury resulting from employee throwing arm against glass held in hand of another employee held to arise out of and in the course of employment where no evidence of horseplay.

Motion for Nonsuit.—Motion for nonsuit in hearing before Commission is a useless procedure for that the Commission is required by Section 58 to make findings of fact which are binding and conclusive on the parties. If there is any merit or necessity for nonsuit this is waived by introducing evidence thereafter and not renewing the motion. *Satterthwaite v. Davis*, 186 N. C., p. 566.

Hearing before Commissioners J. Dewey Dorsett and T. A. Wilson at Newton, N. C., August 21, 1929.

Claimant appeared in person.

Ralph V. Kidd for the defendants.

Opinion by Dorsett, Commissioner.

Statement of Case

Chancie Queen claims compensation for disability resulting from an accident on July 11, 1929, at about 1:30 o'clock. The Employer's Insurance Carrier denies liability on the sole ground that the injury resulting in disability was not caused by an accident arising out of and in the course of Plaintiff's employment.

Plaintiff testified that he was regularly employed by the Clyde Mills; that his job was to "run drawings"; that at the time of the injury he had caught up with his work and was waiting for certain "cans" that were necessary in his work; that it was his custom to idle around when up with his work. His own words are: "I was standing talking to Clyde Daves. He (Daves) had a piece of glass in his hand, and I didn't know it. When Daves came up to me I raised my arm up and cut it." It was not denied that the Plaintiff was up with his work; that he worked in the lower part or basement of the mill; that he was standing in or close to the basement door at the time of the accident, and both witnesses testified that they were not scuffling and neither had put his hand on the other.

In answer to question of the Carrier's Attorney: "Is it customary to idle around in the mill whenever you catch up with your work or to step out to the doorway or to a window?" replied that he guessed it was—"Nobody never says nothing about it."

Both witnesses testified that they were not fired for this practice, and there is no evidence that there is any rule against this practice. The evidence is undisputed that the plaintiff at the time of the injury had completed his assigned task and was awaiting the furnishing of certain cans by his employer, so as to proceed with his work of running a drawing frame; that is was the customary and usual thing to do when employees had caught up with their work to wait outside the door, as was being done in this case, at the time of the injury, must necessarily be implied from the evidence.

Findings of Fact

That the plaintiff, while in the employ of the defendant on July 11, 1929, suffered a cut on the left arm, which injury arose out of and in the course of the employment, is now found. "Out of" points to the origin and cause of accident, "In the course of" to the time, place and circumstances under which the accident takes place. An accident arises in the course of the employment when it occurs within the period of employment, at the place where the employee may reasonably be in the performance of his duties, and while he is fulfilling those duties. The injury necessitated medical services rendered by Dr. Glenn Long, which were procured by the plaintiff, but the bill for same has not been paid by the employer, and it is a question to be disposed of in the award made hereunder. However, there is no evidence of the amount. The injury sustained by the plaintiff as set out above, resulted in his being totally disabled from July 11 to July 22; deducting the seven days waiting period as prescribed by the Act, a period of four days total disability resulted from the accident, which is 4/7 weeks, the average weekly wages of the plaintiff being at the time of the accident, $11.42.

The only indication in the record supporting this alleged horseplay is the statement of both witnesses that when Daves approached the plaintiff with a piece of broken glass in his hand, the plaintiff threw up his arm, apparently in defense, striking is arm against the glass which inflicted the injury. The defendant has failed to sustain the burden of proof upon the issue of horseplay.

Upon the foregoing findings of fact the Commission arrives at the following

Conclusions of Law

1. Under Section 29 of the Act, the plaintiff is entitled to 60 per cent of his average weekly wages, subject to the minimum of $7.00 during the period of disability, less the seven-days waiting period.

2. That if there was any merit in or necessity for the motion of nonsuit made by the defendant at the close of evidence produced by the plaintiff, this was waived by the defendant, the counsel for defendant introducing evidence thereafter and failed to renew his motion upon the close of the evidence.—*Satterthwaite v. Davis*, 186 N. C., p. 566.

In this connection the Commission must comment upon the uselessness of such procedure, inasmuch as Section 58 of the Act makes it the duty of the Commission in every case to make findings of fact which under Section 60 are binding and conclusive upon the parties, this making it obligatory upon the parties to present evidence supporting their contentions, if it is their desire to have such contentions considered.

3. It is ordered that an award be made against the defendants to pay compensation at the rate of $7.00 per week for a period of 4/7 weeks; that Dr. Glenn Long's bill for medical services rendered be paid by the defendant, and that the defendant pay the costs of this hearing.

[Docket No. 9]

ROSEWELL W. HENNINGER, Plaintiff, v. THE NORTH CAROLINA INDUSTRIAL COMMISSION, Defendant

Filed September 5, 1929

FACIAL AND HEAD DISFIGUREMENT.—A disfigurement to be compensable should be serious and to be deemed serious must not be trifling, but such as to more or less affect the employee's ability to procure employment at customary occupation, or make employee more or less repulsive to the public and more or less unsightly in the eyes of his fellowman.

Hearing before Commissioner J. DEWEY DORSETT, at Raleigh, N. C., August 24, 1929.

Plaintiff appeared in person.

Defendant represented by *Mr. Frank Nash*, Assistant Attorney General.

Opinion by DORSETT, Commissioner.

Statement of Case

It was agreed by the parties at the hearing that the plaintiff sustained an injury on July 15, 1929, as a result of an accident, which accident arose out of and in the course of his employment. That the plaintiff suffered no compensable disability, and that the medical bills incurred have been paid by the defendant.

The sole question at issue is: Will any serious facial or head disfigurement result from the injury.

The plaintiff testified that in his opinion the result of the injury was a serious disfigurement. Dr. W. B. Dewar testified that the plaintiff has cuts on his nose and head that will leave scars on same. That the scar on the lower third of his nose from the right side in front and around to the left side of nose was curved and about 1 inch in length and about 1-16 of an inch in breadth—at the present time with some redness on the borders. The scar on the left side of head is somewhat similar to scar on nose, except not so pronounced and is on a portion of the body that is normally covered with hair. That the scar on his nose has disfigured him at the present time, has destorted his looks and is definitely noticeable. That in his opinion these scars will become less pronounced after a period of three to six months, however, in his opinion they will be permanent. That the scars were going to be there, less pronounced with time. That he regarded same as definite disfigurement, but not serious and only surface wounds. That one could see the scar on his nose in 6 months definitely although much less pronounced than at the present time. That it was his opinion the scars are not so serious as to affect plaintiff in securing employment in any way.

Upon the evidence submitted in this case, the Commissioner makes the following

Findings of Fact

The one and only question involved in this matter is, as a matter of fact, has the plaintiff sustained a serious disfigurement of the face or head? The hearing Commissioner is in agreement that there is some disfigurement involved, but after a careful examination of all the evidence and the plaintiff's nose and head, the Commissioner cannot find that the scars the plaintiff has are such serious facial or head disfigurements, as to entitle plaintiff to compensation as provided in the North Carolina Law, which provides, in Section 31: "In case of serious facial or head disfigurement, the Industrial Commission shall award proper and equitable compensation not to exceed $2,500."

Upon the foregoing findings of fact the Commissioner bases the following

Conclusions of Law

There is no doubt about the plaintiff's injury leaving a scar on his nose that is a disfigurement and will probably always be a disfigurement, however, to entitle plaintiff to compensation the resulting disfigurement must be serious and the Commission must so find before any award in his favor can be made. In addition to personal observations made at the hearing, the Commissioner has the benefit of an opinion by a medical expert in whose opinion the scar on the nose was only about 1 inch long and 1-16 of an inch wide is not serious and would in the course of time grow less noticeable and was not, in his opinion, serious.

The definition of serious is necessary in determining whether or not an allowance can be made for head, facial or bodily disfigurement, as the law says such disfigurement must be serious. Proof must be had as to serious disfigurement, and unless serious, compensation cannot be allowed.

Serious means important, weighty, momentous and not trifling. Slight and trifling marks are not serious disfigurements—a scar or mark of some kind almost universally results from an injury involving the lacerations of the skin, and some degree of disfigurement results therefrom. It is plain that disfigurement alone is not the basis of compensation, because the use of the word "serious" indicates that it is not the intention of the Legislature to allow compensation for the usual and ordinary disfigurement resulting from the healing of the cut or laceration.

In those states having a similar provision in its Workman's Compensation Acts allowing compensation for serious, facial disfigurements, the Courts have uniformly held that the disfigurement must be momentous and not trifling; otherwise an award for compensation in addition to payments for resultant disability would have to be made in every case of an injury since all injuries will leave some slight scar or disfigurement.

Harpen on "Workmen's Compensation," Section 142, expresses it thus:

"Disfigurement is not a disability as that term is generally used unless it prevents or interferes with the workmen's reëmployment."

Our Supreme Court in the case of *State v. Huntley*, 91 N. C., 617, speaking to the subject of "serious damages" as referred to in the Code, Section 892, providing a penalty for serious damage in Assault and Battery Cases, says:

"Such offense is not petty, small, trifling and of little importance in the eyes of the law."

From this it must be concluded that our Court would define a serious facial or head disfigurement as one that was not trifling and unimportant and not permanent as are the scars left in the case which the plaintiff contends are a serious disfigurement and "marring his beauty." Speaking to this subject the Court of three, in *Superior Mining Company v. Ind. Commission*, 141 N. E., 165, 309 III, 339, recites this principle:

"A disfigurement warranting compensation must be permanent and serious and bear some relation to the capacity to earn and secure employment, and where a disfigurement over the eye consists of two slight blue scars, which were not visible at a greater distance than 4 1-2 feet and which were hidden when the eye was open, compensation was unwarranted; 'disfigurement' being that which impairs or injures the beauty, symmetry or appearance of a person or thing; that which renders unsightly, misshapen or imperfect or deforms in some manner."

From the foregoing, the Commissioner concludes, that, to be compensable, a disfigurement should be serious and to be deemed serious must not be trifling, but such as to more or less affect the employee's ability to procure employment at such an occupation to which he has been accustomed to follow or make the employee more or less repulsive to the public, and as more or less unsightly in the eyes of his fellow man.

For the reasons stated the plaintiff's claim is denied and the Commission's file will be closed thereon.

Each party will pay their own costs.

[Docket No. 4]

HENRY HODGES, Plaintiff, v. ROWLAND LUMBER COMPANY, Defendant
Self-insured

Filed September 7, 1929

Facial and Head Disfigurement.—Where it is impossible because of emaciated condition of plaintiff the hearing Commissioner will continue the case for further action so as to determine if serious facial or head disfigurement will result. This case being result of plaintiff being struck in jaw by splinter thrown from "hog."

Hearing before Commissioners Wilson and Dorsett at New Bern, Craven County, North Carolina, August 29, 1929, at 11:00 o'clock a.m.

Claimant appeared in person.

Plaintiff represented by *William F. Ward*, New Bern.

Defendant represented by *I. O. Moore, Moore & Dunn*, New Bern.

Opinion by WILSON, Commissioner.

Statement of Case

Henry Hodges claims compensation for "serious facial and head disfigurement" resulting from an accident on July 2, about 2:30 p.m. The Rowland Lumber Company, of New Bern, self-insurer and his employer, denies same.

Temporary total disability was agreed to as the result of the same accident "arising out of and in the course of employment" of Henry Hodges by the Rowland Lumber Company while feeding the "hog." It was further agreed that the average weekly wage was $18, and that all medical, hospital, and doctor's bills, were paid by the defendant. Prior to the hearing claimant had refused weekly compensation for fear it would prejudice claim. He was ordered to accept compensation checks tendered as it would not prejudice his further claim. Dr. Patterson testified that in his opinion Hodges was able to resume work on August 30, 1929.

It was further agreed that claimant's jaw was broken and his chin cut open just underneath the right side. The necessary bridge was furnished Hodges by said company to replace teeth lost, and all other teeth properly repaired.

Several witnesses for claimant testified that they had worked with Hodges for many years and observed his face to be different since the accident. Havens, a shoemaker, testified that claimant's face was "abnormal." The right side was not as "symmetrical" as the left and looked as if he may have had a "stroke." No expert testimony was offered by the claimant.

The medical doctor and dentist testified for defendant. Both testified there would be no "serious facial or head disfigurement." The dentist admitted that claimant's mouth would only be about 80 per cent of normal. He further testified that it would not be noticeable to the layman.

Claimant testified he was satisfied "with the job the dentist gave."

Upon personal examination by Commissioners, the scar, because of size, was scarcely noticeable, and not noticeable when the head is in its normal position. The claimant could smile and the doctor testified none of his face muscles were paralyzed.

Findings of Fact

1. Both the claimant and defendant are bound by the provisions of the Workmen's Compensation Act of 1929.

2. The Claimant was injured July 2, 1929, about 2:30 p.m.; the injury arose "out of" and "in the course" of his employment while feeding the "hog."

3. Claimant was totally disabled from July 2 to August 29, 1929, inclusive. His average weekly wage at time of injury was $18.

4. Claimant's jaw was broken on right side; chin underneath had scar of about one inch; several teeth were removed because of accident and replaced with artificial teeth, others repaired; lower teeth projected slightly;

right side of face was slightly flat or not quite as symmetrical as left side.

5. For the reason that plaintiff has been in the hospital for sometime and also unable to eat his usual food because of the soreness of his jaw, the Commission is unable to draw a fair and just conclusion at this time as to whether plaintiff has a "serious facial or head disfigurement" because of the emaciated condition of plaintiff.

6. All medical, hospital, surgical and dental services were furnished by defendant.

Conclusions of Law

1. Claimant is entitled to 60 per cent of average weekly wage for period of total disability, plus all medical services.

2. The disfigurement claim will be continued for at least thirty days to the end that the Commission might observe the plaintiff under more normal conditions. No decision will be made until after the second hearing.

Award

It is directed that an award be made against the defendant to pay the plaintiff compensation for total disability from July 2, to August 29, inclusive at the rate of $10.80 per week, and that defendant pay all medical and surgical services.

The matter of attorney's fees will be disposed of at the second hearing.

Each party will bear its own costs.

[Docket No. 16]

J. A. RUDISILL, Employee, Plaintiff, v. REX SPINNING COMPANY, Employer, and GLOBE INDEMNITY COMPANY, Carrier, Defendants

Filed September 21, 1929

Loss of Vision.—Loss of use of one eye under Sections 31 (q and t) entitles injured employee to 60 per cent of average weekly wages for 100 weeks.

Average Weekly Wages.—At time of accidental injury, average weekly wages found to be the same as was received by other employees doing the same class of work.

Because of the impossibility of getting all of the parties together, no formal hearing was held, but the witnesses were sworn and testimony taken before Commissioner Dorsett in the places where the witnesses were found.

The plaintiff appeared in person.

The defendant employer was represented by *Mr. H. T. Godwin*, Assistant to the Treasurer.

The insurance carrier was represented by *Boyce & Ware, Inc.*, of Gastonia.

Opinion by DORSETT, Commissioner.

Statement of the Case

The facts in this case, with the sole exception of the average weekly wage, are not in dispute. J. A. Rudisill, plaintiff, met with an accident on July 29, 1929, the accident occurring in this manner: the plaintiff was polishing a wire wheel and a piece of wire struck his right eye. The wire had to be pulled out of his eye. In thirty minutes his sight began to blur and it continued to get worse. The eye was badly injured. The plaintiff went on August 1 to Dr. T. C. Quickel of Gastonia. This doctor says that the injury will result in a permanent defect; namely, the complete loss of vision in the right eye. Dr. Quickel further testified that, in his opinion, the injured eye would have no effect on the vision of the good eye. On August 5 the plaintiff went to see Dr. A. M. Whisnant. Dr. Whisnant says that his examination showed an injury to the lens, producing traumatic cataract. A later examination showed progressive blurring. Dr. Whisnant also testified that the injury to the eye resulted in complete loss of vision in the injured eye and that the same would not, in his opinion, affect the good eye, but the loss of vision in the injured eye to be permanent.

As above stated, the sole question, the issue in this case, is that of average weekly wage. The fact is not in dispute that at the time of the injury, the plaintiff was receiving $18 per week for his services to the defendant, the Rex Spinning Company. An agreement to pay compensation was offered the plaintiff and he refused to sign it for the reason that he was not satisfied with the average weekly wage part of the agreement. In his own words: "When we got to that part of the agreement the question came up whether or not I was able to earn the same amount of money since the loss of vision as before and I said, 'No,' and he (Insurance representative) said, 'Yes.' That was the end of that."

It is of record, testified to by both the employer and the plaintiff, that this plaintiff had worked only a few days for this defendant employer prior to the accident, having gone to work for this employer on July 22, 1929; that at the time of the accident the plaintiff was being paid thirty cents an hour, or $18 per week for his services and that the plaintiff was just an ordinary employee, in that he was not a boss, foreman, or superintendent. It is also of record that the plaintiff is back at work and is being paid the same wages now that he was being paid prior to the time of the accident; and that the plaintiff was being paid and is now being paid the same wages that is paid for that character of work as is being done in that locality or community. The plaintiff is being paid the same wages paid other employees to do the same class of work, and the plaintiff is doing the class of work that he was doing prior to the injury. It is also in evidence that this plaintiff worked for about seven months prior to coming with the Rex Spinning Company for a mill in Bessemer City, N. C.; that while working in this Bessemer City mill, just as an ordinary employee, his wages were $18 per week. Some of the time, however, at the Bessemer City Mills he was a foreman or boss and was paid more. This plaintiff further testified that at one time he was superintendent of a mill in Texas, and was paid as high as $36 per week.

Upon all the evidence in this case is made the following

Findings of Fact

1. The parties to this proceeding are bound by the provisions of the North Carolina Workmen's Compensation Law.

2. The plaintiff was regularly employed by the defendant.

3. The accident resulting in the injury arose out of and in the course of the plaintiff's employment, and occurred on July 29, 1929.

4. The defendant employer's liability to pay compensation is carried by the Globe Indemnity Company, said company being a party to this procedure.

5. Under Section 2 of the North Carolina Workmen's Compensation Law, J. A. Rudisill's wages at the time of the injury are found to be $18 per week.

6. By reason of the injury to the plaintiff's right eye, there is a complete loss of vision in the right eye.

Conclusions of Law

1. By reason of the above findings of fact, this plaintiff is entitled to receive compensation in the amount of sixty (60%) per cent of $18, or $10.80 per week for a period of one hundred (100) weeks as per schedule in Section 31 (q) and (t) of the North Carolina Workmen's Compensation Law.

Award

Compensation is hereby awarded against the defendant, Rex Spinning Company and the Globe Indemnity Company as follows: to J. A. Rudisill, $10.80 per week for a period of 100 weeks; all of the hospital and medical bills. Each side to bear its own costs.

[Docket No. 7]

LONNIE HELMS, Employee, Plaintiff v. MYERS MILLS, INC., Employer, LIBERTY MUTUAL INSURANCE COMPANY, Carrier, Defendants

Filed September 21, 1929

BURDEN OF PROOF.—Burden of proof on claimant to establish by preponderence of evidence that injury resulted from an accident arising out of and in the course of the employment.

CLAIM DENIED.—On grounds that Claimant failed to sustain the burden of proof that injury resulted from an accident which arose out of and in the course of the employment.

Hearing before Commissioner J. DEWEY DORSETT, at Gastonia, Gaston County, N. C., on September 4, 1929.

Plaintiff represented by *Ural R. Murphy*, Attorney of Charlotte, N. C., but neither the attorney nor the plaintiff was present at this hearing.

The defendants, Myers Mills, Inc., were represented by the Secretary of said corporation, *Mr. J. L. Bush.* The insurance carrier was represented by its adjuster, *Mr. J. B. Everett* of Charlotte, N. C.

Opinion by DORSETT, Commissioner.

Statement of Case

This is a petition for compensation made by the plaintiff because of an injury that was supposed to have occurred on July 13, 1929. This plaintiff, who requested the hearing, was not present, nor was an attorney of record for this plaintiff present. The defendants were represented by Mr. J. L. Bush, Secretary of the Myers Mills, Inc., and Mr. J. B. Everett, for the insurance carrier.

No agreement could be had in this cause, due to the fact that the employer and the insurance carrier were thoroughly convinced that the plaintiff did not suffer an accident while working for this employer. This plaintiff requested the hearing as set out on Form 33 and stated on that form that no agreement could be had "because of the employers fraud." It is undisputed that this plaintiff was working for the defendant employer on July 13. J. M. Hodge, a fellow employee who worked the same night that the injury was supposed to have occurred and who worked close to this plaintiff the night of July 13, testified that he worked "right beside him" all night; that he did not see this plaintiff nor anyone else get hurt by a belt on that night; that the machines are stopped for cleaning and when the machines are stopped, the belts are thrown on a loose pulley, and the motors are stopped immediately and he did not see the belt on the machine that was being operated by Helms come off; and that he did not see Helms get hit or knocked over, and that Helms said nothing to him about getting hurt.

Mr. J. L. Bush testified that he was secretary, bookkeeper, and time keeper, etc., for the Myers Mills, Inc.; that all reports of accidents are supposed to come through his office; that the first report he had that this plaintiff was injured was on August 7 and that the report came to him through the mail from Charlotte, N. C. advising him that the injury happened on July 13, 1929. He further stated that this plaintiff worked the following Monday night and reported to work Tuesday, but was sent home on account of some trouble in the spinning room with his wife, but that he knew nothing of any accident, and that the plaintiff said nothing to him about any accident having occurred; that he said nothing prior to the time he was sent home. This witness further stated that he had talked to the plaintiff's family about their moving and nothing was said about any accident to this plaintiff by any of the members of the family.

Mr. Vickers, night foreman, said that he had charge on the night of July 13 and that he was in charge of the card room where this plaintiff was working; no accident was reported to him and that no one has ever reported to him that an accident occurred; and that he knew nothing of any accident happening on that night to Helms or anyone else. Mr. D. J. Gardner testified that he was Superintendent at the Myers Mills and that he did sign report No. 19, Employer's Report of the accident to the Employee that the said report had been filled in through question No. 28; that as he recalled it, he signed it at the request of the insurance man and when he signed it he did not mean to say that he knew anything at all about the accident to this plaintiff, but merely signed where he was requested to sign and without reading what had been inserted in the form.

From all the evidence in this case, the Commission makes the following

Findings of Fact

1. Both the plaintiff and defendant are bound by the North Carolina Workmen's Compensation Law.

2. From all the evidence, the hearing Commissioner finds that this plaintiff did not suffer any accident while in the employ of this defendant. Certainly there is not a particle of evidence in the record upon which to find that an accident occurred on July 13, 1929.

Upon the foregoing findings of fact, the Commission bases its

Conclusions of Law

He who claims compensation under the Workmen's Compensation Act has the burden of establishing, by a preponderance of the evidence, that the injury resulted (1) from an accident (2) arising out of (3) and in the course of the employment. The burden of proof is upon the claimant to show that the accident arises out of and in the course of the employment and upon failure to do this, compensation must be denied. The plaintiff in this case has failed to prove the occurrence of any accident and the case is, therefore, dismissed and the costs taxed against the plaintiff.

[Docket No. 15]

EDWARD B. YANCEY, Plaintiff, v. BOYLAN-PEARCE COMPANY, Employer, and GREAT AMERICAN IND. CO. OF NEW YORK, Carrier, Defendants

Filed September 23, 1929

HERNIA.—When plaintiff's accidental injury results in a hernia meeting the five requirements of Section 2 (r) of the Act the defendants must tender an operation within time fixed by the Commission or the plaintiff will be directed to procure such operation, the cost of same to be awarded against defendants; payments of compensation during total disability resulting from the operation awarded against defendants.

Hearing before Commissioner Wilson, at 10:30 a.m., September 13, 1929, in the House of Representatives, Raleigh, Wake County, N. C.

Claimant appeared in person and in his own behalf.

Defendant represented by *Mr. I. O. Brady* and *Mr. I. B. Lake of Smith and Joyner*, Raleigh, N. C.

Opinion by **Wilson**, Commissioner.

Summary of Case

Plaintiff has been an employee of Boylan-Pearce Company for over twelve years, which company has provided compensation insurance through the Great American Indemnity Company of New York. He is employed as receiving and shipping clerk. Holeman, a fellow employee, testified that he had worked with the plaintiff for defendant employer for about four and one-half years and that plaintiff had never lost a day because of sickness.

There was no contest of an accidental injury (strain) within the meaning of Section 2 (f). It was agreed that proper notices of injury were given; and further agreed that the average weekly wage was $42.50. Plaintiff was not tendered an operation.

Plaintiff testified "the heavy freight was usually handled by the porter," but "it was beginning to rain and I wanted to get it in before I went to dinner." The boxes of freight weighed about 150 pounds each. He testified that the hernia was the result of a strain while handling these boxes. Plaintiff testified there was "some pain" following this heavy and unusual work, and "just gradual" increase. "The following day there was some sign of it." He, further, testified there was no sign of hernia prior to July 5. Plaintiff was first examined by a doctor on the 15th of July. On this date he first learned that he had a hernia.

The question, therefore, to be determined by the hearing is: Did the "accident" to plaintiff about noon July 5, while regularly employed by defendant, cause an inguinal hernia?

The plaintiff contends it did. He submitted as witnesses a fellow-employee, Holoman, who testified plaintiff had never previously complained "about any trouble with his stomach or anything of this nature," neither had he lost any time because of sickness. The other witness, Dr. Freeman, testified plaintiff has a hernia on both sides, and that they came from the "strain."

The following questions and answers are quoted from Dr. R. H. Freeman's testimony:

Q. In your opinion, do you think this rupture or hernia is new? A. It is small; it isn't very large and hernia of long standing usually develops in size.

Q. Develops in size? A. Yes; in the great majority of cases. I do not think anyone could say except Mr. Yancey himself.

Q. In your opinion, is it possible that this hernia could have developed from this accident? A. Yes; it comes from a strain, or heavy lifting.

Q. And from your observation of Mr. Yancey's hernia, it is possible that it could have developed at that time? A. *Absolutely!*

In answer to question as to whether "potential conditions exist at birth," Dr. Freeman said: "There is no doubt that in a great many cases that the weakness is congenital; in others it is not. It isn't a hernia until the intestine makes its appearance down in the sac." The doctor further testified plaintiff "has a small protrusion on one side and considerably more on the other."

Dr. Freeman said the plaintiff is the only person who could say if he had bi-lateral hernia before lifting boxes July 5.

The doctor further says that it is possible to continue work with the type of hernia plaintiff has.

Dr. Freeman is a graduate of Jefferson Medical College, Philadelphia. He graduated in 1908, followed general practice until 1920, since the latter date he has been a surgeon.

It was agreed to read into the record the report of Dr. W. B. Dewar; part of which read: "I believe that patient had bilateral inguinal hernia before lifting the boxes without his knowledge of same." Dr. Dewar was employed by the carrier-defendant; he did not testify.

Dr. K. P. Neal, the only defense witness, testified he graduated from Harvard Medical School, 1917, and practiced in hospital and army until 1920. The past five years he has been a surgeon.

Dr. Neal testified he found Yancey "to be suffering from a perfectly developed inguinal hernia on the right and a very early hernia on the left." The right hernia was as large as a "small hen egg." "When there is no strain there is no hernia, but a weak spot that could be felt on the left."

Dr. Neal testified that in his opinion there was a potential hernia on the right side prior to July 5. The left side "did not give rise to these symptoms." Neal explains a "potential hernia" as "a weakness in the abdominal wall at the point where the sepermatic cord comes through the muscles."

If a man should severely strain himself so as to break his abdominal wall, Dr. Neal testified, "the patient would complain of an acute burning, stinging pain just at the point of separation, associated with faintness, weakness; later on . . . continued soreness in such a spot, for a few days. In any coughing, sneezing, or any undue strain, he would feel acute pain at the spot." He further testified a man might have only slight pain or stinging sensation. If not a "great deal of damage" is done at the time. "The hernia may be slow in protruding." He said that the pain would be controlled by the degree of the strain. If a heavy weight is lifted, causing hernia, a sac is created "almost instantly." If the abdominal "muscles were very taut and strong and there was a weak spot, there would be much pain. This would depend on how much separation there would be in that part." He further said, very few hernia "are abrupt." Most of them are small and grow as the condition is aggravated.

In answer to the following question, "Is it customary that patient have an acute pain in every rupture?" Dr. Neal said: "It is more frequently not, than so." He further said patient could continue light work with only a slight discomfort.

Much has been written on hernia by medical authorities, some contending that there is no such thing as traumatic hernia; others take the opposing view, thus leaving a divergence of professional medical opinion.

The day the North Carolina Legislature adopted the Workmen's Act, with Sub-section (r) of Section 2 defining the five requirements of a hernia to be compensable as an "injury by accident," the views of those who believe in traumatic hernia were accepted.

Much was said in the testimony about potential hernia, but the law is silent on "potential." It deals with "hernia" and its five requirements. We find this defintion of a hernia in *Gould's Medical Dictionary:* "A protrusion of a viscuous through an abnormal opening in the wall of the containing cavity."

Both doctors testified there is no hernia until there is a protrusion. It would be difficult to find a worker without some potential physical weakness.

Findings of Fact

1. Plaintiff Yancey is regularly employed by Boylan-Pearce Company, who have qualified under the compensation act by insuring their liability with the Great American Indemnity Company of New York.

2. There was on July 5, 1929 an "'injury by accident' arising out of and in the course of the employment" of plaintiff causing a bilateral hernia of grave proportion on the right side and of lesser size on the left.

3. That said bilateral hernia fulfilled all five requirements of section 2 (r) as follows:

There was an injury resulting in hernia.

The hernia appeared suddenly.

It was accompanied by pain.

Said hernia immediately followed an accident.

That hernia did not exist prior to the accident for which compensation is claimed.

4. The average weekly wage is $42.50.

5. Plaintiff was not tendered an operation, and there are no outstanding medical and hospital bills.

6. Plaintiff is physically able to have a "radical operation."

Conclusions of Law

1. Defendant's insurance carrier shall tender plaintiff an operation as provided for in Section 2 (r) and Section 25 of the North Carolina Workmen's Compensation Act of March 11, 1929. Said operation shall be tendered within thirty days from date, or thereafter the plaintiff is authorized to procure said operation. The cost of which shall be awarded against the defendant.

2. Plaintiff shall be paid 60 per cent of his average weekly wage, subject to the weekly maximum of $18, for all time lost from employment because of said accident and operation, as provided for in Section 29 of said Act.

Award

In due time an award in accordance with the above facts shall be made. Defendants shall pay all costs.

[Docket No. 8]

ALFRED LEWIS PETERSON, Plaintiff v. DUKE POWER COMPANY, Self-insurer, Defendant

Filed September 27, 1929

Approval of Agreements.—Where plaintiff and defendant enter into an agreement just prior to the hearing, and hearing commissioner approves agreement, no necessity for conducting hearing.

Plaintiff represented by *Wm. C. Meekins*, Attorney, Hendersonville, N. C.

Defendant represented by *Mr. J. M. Sutton*, claims department head, for the defendant.

Opinion by DORSETT, Commissioner.

There was no formal hearing in this case. It was agreed in the presence of hearing Commissioner at Brevard, N. C., to pay this plaintiff compensation in the amount of $9 per week for a period of three weeks, and the defendant further agreed to pay all medical costs and costs of this hearing. Form No. 27 was executed by the parties in dispute and is a part of the record in this case. No testimony was taken. All of the witnesses were excused. The agreement was had because this Commission is of the opinion that the rights of all the parties interested were properly cared for.

[Docket No. 18]

JOE GRANT, Employee, Plaintiff, v. J. E. ALLEN, J. B. FRAME, JOHN W. HUDSON, JR., Employers, and U. S. F. & G. COMPANY and CENTURY INDEMNITY COMPANY, Defendants

Filed September 25, 1929

PRINCIPAL CONTRACTOR AND SUB-CONTRACTOR.—Award will be made against immediate employer who was sub-contractor, then against Insurance Carrier of principal contractor. In case not paid award is against the principal contractor.

Hearing before Commissioner WILSON at Raleigh, N. C., September 21, 1929.

Claimant did not appear; not otherwise represented.

Defendants were represented: Allen & Frame by *J. E. Allen* and *J. B. Frame;* J. W. Hudson by *A. J. Fox*, General Manager; U. S. F. & G. Company by *M. G. Godwin.*

Century Indemnity Company was not represented.

Opinion by WILSON, Commissioner.

This hearing was held to ascertain the party or parties liable and the order in which each party is liable as provided for in Section 19 of the Compensation Act. It was agreed that there was an accident 'arising out of and in the course of the employment" of Joe Grant by J. E. Allen & Company, sub-contractors of John W. Hudson, Jr., principal contractor in the erection of the Raleigh Banking & Trust Building. Said accident resulted in fracture of skull, fracture of left clavicle, and fracture of right knee (lower and femur).

Upon the evidence in this case, the Commission makes the following

Findings of Fact

1. That Joe Grant was injured while regularly employed by J. E. Allen & Company, at the time sub-contractors of John W. Hudson, Jr., principal contractor on the Raleigh Banking and Trust Building, Raleigh, N. C. Said injury resulting in total disability. The accident "arose out of and in the course of the employment" of Joe Grant about 8:30 a.m., July 6, 1929, at Raleigh, N. C.

2. That J. E. Allen and J. B. Frame, partners, operating under the firm name of J. E. Allen & Company, did not have compensation insurance at the time of the accident; the principal contractor, John W. Hudson, Jr., had compensation insurance with the U. S. Fidelity & Guaranty Company.

3. That the average weekly wage of plaintiff was $11 per week.

4. That no medical, bills have been paid. Some compensation has been paid plaintiff, but the defendant, J. E. Allen & Company, remembered neither the amount per week nor the total paid.

5. That the Century Indemnity Company should not be made a party to this action. Its policy covering Allen and Frame was issued subsequent to the accident.

Conclusions of Law

1. Plaintiff, Joe Grant, is entitled to compensation at the rate of $7 per week for the duration of his total disability, not to exceed 400 weeks, as provided in Section 29 of the Compensation Act; in addition, all necessary medical, surgical, and hospital treatment as provided in Section 25.

2. Under Section 19 of the Compensation Act, J. E. Allen and J. B. Frame, partners, as immediate employers of plaintiff are first liable for compensation and medical treatment to plaintiff.

3. U. S. Fidelity & Guaranty Company, as carrier for John W. Hudson, Jr., principal contractor, stands second in liability for above claim as provided for in Section 19 of said Act.

4. John W. Hudson, Jr., as principal contractor, stands third in liability for above claim.

Award

1. Within ten days from date, Allen & Frame, defendants, shall pay due and past due compensation at the rate of $7 per week to plaintiff, in addition pay all due and past due medical, surgical, and hospital bills incurred by plaintiff as result of said accident.

2. If the above specified compensation and medical, surgical, and hospital bills are not paid within ten days from date, then said U. S. Fidelity & Guaranty Company shall pay same within the next succeeding ten days.

3. If the U. S. Fidelity and Guaranty Company does not pay same, then John W. Hudson, Jr., shall immediately pay same.

4. Allen & Frame, as the immediate employers of plaintiff, are first liable for all future compensation and medical, surgical, and hospital bills due on and from this date; if said Allen and Frame do not pay same promptly when due, then said U. S. Fidelity and Guaranty Company, as carrier for John W. Hudson, Jr., principal contractor, as second in order, shall be liable for all future compensation and medical, surgical, and hospital treatment; John W. Hudson, Jr., principal contractor, as third in order shall be

liable for all future obligations as set out above if Allen and Frame and the U. S. Fidelity & Guaranty should default in payment of same.

[Docket No. 2]

WILLIE B. JONES, Employee, Plaintiff, v. R. J. REYNOLDS TOBACCO COMPANY, Employer, MARYLAND CASUALTY COMPANY, Carrier, Defendants.

Filed September 27, 1929.

ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT.—This is the most perplexing question presented where the facts do not specifically bear out that the accident does arise out of and in the course of employment. Each case must be decided with reference to its own attendant circumstances and argument by analogy is valueless. There must be some casual connection between the accident and the employment. An accident happening on premises of employer is an aid in determining this question, especially where injury occurs after injured employee arrives on the premises and had not actually started work, and after quitting work before actually leaving employer's premises—the accident is held to arise out of and in the course of employment. Where injury to employee results in accident while running upstairs to place of work held to arise out of and in the course of the employment.

HERNIA.—Where injured employee refuses to undergo an operation for hernia, Carrier must tender operation and employee entitled to same within one year after date of accident, if he so elects.

Claimant appeared in person.

Defendant represented by *P. Frank Hanes* and *H. M. Dubose, Jr.*, of Winston-Salem, N. C.

Opinion by ALLEN, Chairman.

The hearing in this case was had upon the request of the defendants to determine if the hernia sustained by the plaintiff arose out of and in the course of his employment.

Findings of Fact

The facts are not disputed. The plaintiff, just prior to reporting to work on the morning of July 2, 1929, with the R. J. Reynolds Tobacco Company, (by whom he was regularly employed), assisted in taking a person who had fainted to his home. Upon returning to the factory of the defendant, the plaintiff, thinking he was late for work, ran hurriedly up the stairs leading to the fifth floor, and in doing so, stumbled on the stairway on the third floor, catching a fellow employee by the suspenders as he fell. Immediately thereafter he complained of a pain in the side, and was sent to Dr. E. S. Thompson, surgeon for the defendant. Dr. Thompson found the plaintiff had a small right inguinal hernia. The plaintiff's recital as to the occurrence of the accident was corroborated in detail by Dr. Thompson. The plaintiff testified that he lost no time, and was not now suffering from the injury and did not desire an operation to repair this hernia. He further testified that his wages were twenty-five cents per hour and that he worked nine hours per day for five and a half days of each week, and that his average weekly earnings were $12.38.

There was no evidence of a pre-existing hernia.

Upon consideration of all the evidence, the Commissioner makes the following findings of fact:

1. That the plaintiff has a right inguinal hernia resulting from an injury by accident, which arose out of and in the course of his employment on July 2, 1929.
2. That the hernia, or rupture, appeared suddenly.
3. That it was accompanied by pain.
4. That the rupture or hernia immediately followed an accident.
5. That the rupture did not exist prior to the accident for which compensation is claimed.
6. That the plaintiff has refused to undergo a radical operation for treatment of the hernia.
7. That the plaintiff has not sustained any disability.
8. That the plaintiff's average weekly wage at the time of the accident was $12.38 a week.

Upon the foregoing findings of fact the following conclusions of law are reached:

Conclusions of Law

An examination of the authorities of States having similar Compensation Acts discloses that the most perplexing question that they have had to determine is in those border line cases involving the question as to whether or not a particular accident arose out of and in the course of the employment.

In this case the employee was upon the employer's premises, having ascended three flights of stairs necessary for him to climb to reach his place of work. With no evidence to the contrary we must conclude that the plaintiff was following the usual and customary mode and manner of ingress provided for the employees by the employer.

It is not contended that the employee was actually engaged in his work at the time of the accident.

In such a situation the Commissioner, unfortunately, has no rule of our own Court to follow as a guide in determining the question presented upon the facts in this case but must look elsewhere for aid in arriving at the proper conclusion.

The Supreme Court of Iowa, in the case of *Griffin v. Cale Bros.*, 183 Iowa, 415; 165 N. W. 577, quotes with approval the following from Corpus Juris on Workmen's Compensation, (73 C.J.): "In determining whether an accident arose out of and in the course of the employment each case must be decided with reference to its own attendant circumstances, and it has indeed been stated rather broadly, but by eminent authority, that argument by analogy is valueless."

Certainly the Commissioner finds this true in the instant case. It is well established that there must be some casual connection between the accident and the employment. Schneider on Workmen's Compensation, Vol. 1, 502.

The fact that this accident happened on the premises of the employer is an aid in arriving at the conclusion reached by the Commissioner when viewed in the light of eminent authorities.

In *Wabash Manufacturing Co. v. Indiana Commission*, 294 Ind., 119; 128 N. E. 290, the Court said that it seemed to be well established that if an employee is injured after he arrives upon the employer's premises, although before he actually starts work, or after quitting work before he actually leaves the employer's premises, that the accident arose out of and in the course of the employment.

In Sundine's case, 218 Mass., 1; 105 N.E., 433, compensation was awarded and employee who was injured on a stairway which afforded the only means available for going to and from employer's premises, even though it was shown that the employer had no control over such stairway.

In case of *De Constantine v. Public Service Commission*, 75 W. Va., 32; 83, S.E. 88, the Court said: "If a workman is injured on the premises of the employer and while leaving his place of actual work by the usual course of travel, the injury is deemed to have arisen out of the employment."

A recent opinion by the Supreme Court of Errors, Connecticut, in *Mascyla v. Connecticut Tool Engineering Company* (No. 80865, p. 8301), lays down the principle that "Compensation may be awarded for injuries received by an employee who while standing in the factory yard a few minutes before the opening whistle blew, was struck by a fellow employee who was playing with another employee. The employer had not forbidden employees to be in or play in the yard."

Under the authorities above referred to, as well as many others of like import, the Commissioner has concluded that the facts in this case justify the finding that the accident arose out of and in the course of the employment.

As pertaining to the findings as to the existence of the hernia, the facts as found, considered in connection with the clear language of section 2 (r) of the Act, justify the finding as to the existence of a hernia as a result of an injury following an accident.

Inasmuch as plaintiff has refused to undergo an operation for the repair of the hernia, as provided in section 2 (r), he is not entitled to any compensation during the time of such refusal.

The Commissioner must therefore dismiss the case, subject to the rights of the plaintiff to demand and have, within one year from date of the accident, an operation, and if he does so he will receive the benefits provided under section 2 (r) of the Act.

Each party will pay his or its own costs.

[Docket No. 11]

WADE O. CONRAD, Employee, Plaintiff, v. COOK-LEWIS FOUNDRY COMPANY, Employer, and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Carrier, Defendants.

Filed September 28, 1929

Assault by Co-employee.—Assault growing out of ill feeling between two employees where fellow employee showed lack of respect resulting in subsequent shooting of injured held to be result of an accident arising out of and in the course of employment.

Hearing before Commissioner Allen at Greensboro N. C., September 10, 1929.

Claimant appeared in person.

Plaintiff represented by *Mr. D. A. Walser* of *Walser & Walser*, Lexington, N. C.

Defendants represented by *P. C. Jones* and *E. A. Gardner*, Charlotte, N. C.

Opinion by Allen, Chairman.

Statement of the Case

The plaintiff, Wade O. Conrad, was on the 20th day of July, 1929, and for several years prior thereto had been, regularly in the employ of the defendant, Cook-Lewis Foundry Company. On the morning of July 20, 1929, some words were passed between the plaintiff and one Solly Squires (Charlie Weaver). The plaintiff resented certain remarks uttered by Solly Squires and struck him with a shovel, whereupon Solly Squires left the shop, went to the employer's office, received his wages, was understood as having said that he was quitting, and he was told at the office that he was no longer wanted and they did not want to see him around there any more. This was about eight o'clock. About a half hour later Solly Squires returned and shot the plaintiff with a shot gun.

It was admitted that the plaintiff was in the employ of Cook-Lewis Foundry Company, that his average wage was about $31.00 per week, and that he is still totally disabled as a result of the assault committed by Solly Squires. The plaintiff and the defendant, Cook-Lewis Foundry Company, were both subject to the provisions of the North Carolina Workmen's Compensation Act, and the defendant, American Mutual Liability Insurance Company, had insured the compensation liability of the said Cook-Lewis Foundry Company.

The defendant, American Mutual Liability Insurance Company, denied liability for the payment of compensation, alleging that the injury to the plaintiff is not the result of an accident which arose out of and in the course of his employment.

The assailant, Solly Squires, was a helper in and about the shop of the Cook-Lewis Foundry Company and his duties required that he assist the plaintiff and other employees when necessary.

Solly Squires, on the morning of the shooting and prior thereto, came by where the plaintiff was working and asked the plaintiff if he was going to work all day or get off at dinner, addressing the plaintiff as Wade. The assailant, Solly Squires, is a negro and the plaintiff is a white man and the latter resented having been addressed by the former as Wade, and said "Charlie somebody is going to knock your head off for that," whereupon Solly Squires walked away and looked back and called the plaintiff a God dam lie and a son-of-a-bitch, whereupon the plaintiff hit him with a shovel. The assailant had acquired the habit of addressing all the men in the shop by their first names and on the Thursday preceeding the assault Mr. H. W. Lee, another employee, told him that if he was going to call him anything to call him Mr. Lee, whereupon the assailant said "I won't call no dam white man mister."

Findings of Fact

From all of the evidence the Commission finds the following facts:

1. That on the 20th day of July, 1929, at about 9:00 o'clock A.M., the plaintiff was injured as the result of an accident which arose out of and in the course of his employment.

2. That as a result of his injury the plaintiff has been totally disabled within the meaning of the North Carolina Workmen's Compensation Act, is now so disabled and that total disability will in all probability continue for sometime.

3. That the injury sustained by the plaintiff is of such a nature that total disability may be followed by a more or less extended period of partial disability. Dr. J. L. Sowers, who attended the plaintiff, having testified that the plaintiff had a large gun shot wound in his right side, the wound being about two inches deep and about one inch in diameter, and that about two-thirds of the plaintiff's lung is compressed and not in use, and that the plaintiff will never be able to use all of his lung.

4. That the plaintiff and the defendants are bound by the provisions of the North Carolina Workmen's Compensation Act.

Argument

Counsel on both sides submitted briefs bearing upon the question as to whether in this case the injury complained of arose out of and in the course of the employment—the only question at issue. The North Carolina Workmen's Compensation Act defines "injury" as follows: "Injury and personal injury shall mean only injury by accident arising out of and in the course of the employment," etc., Section 2, sub-section "F." It has been held that whether an injury arises out of and in the course of employment is a question of fact. *Owens v. Williams* (Ind.), 152 N. E., 841. We are of the opinion, however, that whether under a given fact situation an employee has suffered an injury, within the meaning of the Workmen's Compensation Act, is a mixed question of law and fact, as has been held by the Supreme Court of Virginia in the case of *Kiser v. Clinchfield Carbo Corporation*, 124 S. E., 271. If we analyze the definition of the word "injury," we find the use of the conjunction, "and," is significant in that it is so used as to require that an accident, if it is to constitute an injury within the meaning of the Workmen's Compensation Act must arise out of *and* in the course of the employment. Obviously, if an accident arises *out of* the employment, it ordinarily arises *in the course of it;* but the converse is not true. An injury may occur in the course of the employment and yet not arise out of it. "Arising out of it" is not synonymous with "in the course of," but these expressions impose a double condition." "In the course of" relates to the time, place and circumstances under which the accident occurred, and an accident arises in the course of the employment when it occurs within the period of the employment, at a place where the employee may reasonably be in the performance of his duties, and while he is discharging these duties or engaged in doing something incidental thereto. The words "arising out of the employment" refer to the casual connection between the employment and the injury. *New Amsterdam, etc., Co., v. Summerell,* (Ga.), 118 S. E., 786. *Granite Sand and Gravel Co. v. Willoughby* (Ind.), 123 N. E., 194.

In the instant case it was proven by uncontradicted evidence that the plaintiff was engaged in the fulfillment of the duties of his employment, at his place of and within the period of his employment as an employee of the Cook-Lewis Foundry Company. We find, therefore, as a matter of law as well as of fact that the accident suffered by the plaintiff arose *in the course of* the employment.

Having found as *a fact* that the said accident also arose *out of the employment* we are now concerned with this condition as a question of *law.* The defendant, American Mutual Liability Insurance Company, cited the case of *Hightower v. United States Casualty Company, et al.*, 30 Ga., 123, holding that compensation was properly denied in that case, the homicide in question having been within the exception stated in subsection (d) of Section 2, of the Georgia Workmen's Compensation Act, excluding "injury caused by a willful act of a third person, directed against an employee for reasons personal to such employee." This is not a case in point, however, as the North Carolina Workmen's Compensation Act contains no such provision, but on the contrary expressly provides that when an injured employee accepts an award for compensation his employer or his employer's insurance carrier is subrogated to any right of action which the employee may have had against a third person for the recovery of damages for injury, loss of service, etc. In the case cited the Court found that Hightower met his death not because of his employment but by reason of the personal feelings of his assailant toward him.

Counsel for the defendant carrier also cited the case of *C. W. Meredith Contracting Company,* 15 (21) A. L. R., 435, which held that an employee cannot recover compensation for an injury inflicted by the foreman of his employer in an assault upon the employee, *unless the employer had reason to anticipate that injury would result if the two continued to work together.* If in the case cited there was a casual connection between the employment and the assault we are of the opinion that the Court's decision is not consistent with the spirit of Workmen's Compensation Laws, for it is inconceivable that an employer should have reason to anticipate every possibility of a disagreement between his employees with respect to matters pertaining to their employment; and it is a matter of common knowledge that where men are closely associated there are innumerable occasions for differences and misunderstanding between them in regard to their employment which may culminate in an assault upon one by another. The better rule, and the one supported by the weight of authority is that affirmed by the Supreme Court of Virginia in the case of *Warfel v. Farmers Manufacturing Company,* 144 Va., 98 (131 S. E., 240), that if a quarrel between fellow employees results from some matter connected with their work and one of them makes an assault upon the other as a result of such quarrel, it is unquestionably true that the injury arose out of the employment. The Industrial Commission of Virginia has gone so far as to hold that where the assault had its inception not in a quarrel but in the collision of the bodies of the claimant and his assailant both of whom were attempting to perform a part of their work, the injury resulting to the claimant arose out of the employment. O. I. C. of Va., Vol. 10, page 269.

Counsel for the plaintiff contends that if the testimony of the assailant that he was crazy and did not know what he was doing at the time he shot the plaintiff should be accepted as true, compensation should not be denied for that reason, citing *Anderson v. Security Building Company,* 40 A. L. R., 119. This case was where two workmen at a foundry were about to go to work when one of them struck and killed the other with a crowbar as the result of a quarrel in regard to their work. Another case cited by counsel for the plaintiff held that "It is now well settled in these Workmen's Compensation Acts that the fact that an injury is the result of a willful or criminal assault does not prevent the injury from being accidental. *Steamas v. Rock Island Coal Company,* 15 A. L. R., 577. In the case cited reference was made to the decision in the case of *Leon Bruno v. Silk Mills,* 229 N. Y., 470, in which the court said: The test of liability under the statute is not the master's dereliction, whether his own or that of his representatives, acting within the scope of their authorities. The test of liability is the relation of the service to the injury, of the employment to the risk."

Conclusion of Law

From the obvious meaning of subsection (F) of Section 2, of the North Carolina Workmen's Compensation Act, and from court decisions in states which have Workmen's Compensation Laws after which the North Carolina Act has been patterned, we have arrived at conclusions of law bearing upon the instant case as follows:

1. That the accident which resulted in injury to the plaintiff arose in the course of his employment, as the plaintiff was engaged in the performance of the duties required by his employment at the time of the accident.
2. That there was a casual connection between the accident and the employment of the plaintiff in that the plaintiff, as an incident to his employment, had a right to require that his assailant, a colored fellow workmen, treat him with proper respect.
3. That there having been a casual connection between the accident and the employment, the accident arose out of the employment.
4. That the accident arose out of and in the course of the employment, and the parties, plaintiff and defendant, having been subject to the provisions

of the North Carolina Workmen's Compensation Act, the plaintiff is entitled to compensation for his injury.

It is, therefore, ordered that an award be made against the defendants, and each of them, to pay to the plaintiff compensation for total disability beginning from July 19, 1929, and continuing during total disability for a period not to exceed four hundred weeks, at the rate of $18.00 per week, payable weekly, and that the defendants pay for medical and surgical services and hospital bills. That this cause be retained for further hearing to determine the extent of permanent partial disability, if any.

It is further ordered that counsel for the plaintiff submit to the commission, for approval, its bill for attorney's fees.

[Docket No. 10]

GEORGE I. THOMPSON, Employee, Deceased, LOUISE THOMPSON, Administratrix; G. M. THOMPSON, et al., Plaintiffs, v. THE STATE OF NORTH CAROLINA, and NORTH CAROLINA HIGHWAY COMMISSION, self-insurer, Defendants.

Filed September 28, 1929

DEPENDENCY.—Where deceased leaves dependents, who, from the evidence, are wholly dependent, an award for 60 per cent of the average weekly wages for 350 weeks will be made.

Where it is to the best interest of afflicted old people and all the parties at interest, lump sum payments of awards will be granted.

Plaintiff represented by *Phillips & Bower*, Attorneys.
Defendant represented by *Charles R. Ross*, Attorney.

Opinion by ALLEN, Chairman.

The hearing in this case was conducted in Davidson County on September 11, 1929. The accident resulting in the death of George I. Thompson occurred in Anson County on July 2, 1929. The hearing was held in Davidson County for the convenience of parties and witnesses and by consent of the parties, plaintiff and defendant.

Upon motion of Charles R. Ross, attorney for defendant, and by consent, Emma Owen Thompson (mother), Louise Thompson (sister), Holt Hunt (sister), M. I. Thompson (brother), Mary Thompson (sister), and Gilmer Thompson (brother), were made parties plaintiff.

It was admitted in open court by the defendant that George I. Thompson, deceased, at the time of his death, on July 2, 1929, was regularly in the employ of the North Carolina State Highway Commission, at a salary of $150.00 per month as a highway patrolman, and that deceased came to his death on July 2, 1929, while in the course of his employment, and by collision with a Ford automobile, thus leaving for determination the one question of dependency.

It appears from the undisputed evidence that the deceased left surviving him his father, G. M. Thompson, and his mother, Emma Owen Thompson; that the father is seventy years of age and has been paralysed since October 12, 1927, and has since been unable to work or attend to any business; that the mother is sixty-five years of age and has been sick for past four years; that she is unable to walk at present time and is and has been under the daily car of a physician; that the deceased up to the time he went into training for the Highway Patrol had for several years attended to all the business and affairs of the family and supplied them with food from his, deceased's, store; that deceased was their only means of support; that deceased had intended and agreed to contribute $100.00 per month from his salary of $150.00.

Upon the foregoing evidence the Commissioner finds as a fact that G. M. Thompson, father, and Emma Owen Thompson, mother, were wholly dependent upon the deceased for their support and that such dependency existed for more than three months prior to the accident and his decease, and that they as such are entitled to all compensation provided for in Section 38 to be equally divided between them.

At the close of the evidence counsel for plaintiff and defendant announced that they had agreed that any award to the plaintiffs might be redeemed in whole by the payment of a lump sum if the Industrial Commission should deem it to the best interest of the dependents.

Upon consideration of the evidence upon this last question, the Commissioner is of the opinion that a lump sum payment will not prejudice the interests of the claimants G. M. and Mary Owen Thompson, but will be to the best interest of these afflicted old people.

It is therefore ordered and adjudged that an award issue providing that the defendants pay to the claimants, G. M. and Emma Owen Thompson, the sum of $5,369.54, it being the commutable value of 350 weekly installments at $18.00 per week, and that the defendants pay the further sum of $200.00 for burial expenses of deceased, and the cost of this hearing.

[Docket No. 6]

TOM WILKERSON, Employee, Plaintiff, v. MARION VENEER AND PANEL COMPANY, Employer, MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed September 28, 1929

FACIAL DISFIGUREMENT.—Where the extent of disfigurement cannot be determined at first, hearing will be continued to future date.

Claimant appeared in person.

Defendants represented by *T. O. Teague*, Attorney.

Opinion by ALLEN, Chairman.

This was a claim from McDowell County for injuries sustained from burns received while firing furnace in mill of defendant Marion Veneer and Panel Company.

It was admitted that plaintiff was regularly employed by defendant mill and that the accident arose out of and in the course of employment; that the average weekly wages of plaintiff at the time of the accident were $15.00 and that he had been paid up to the date of hearing for five weeks at the rate of $9.00 (60 per cent of $15.00) per week. It was further admitted and agreed that temporary total disability would end on Monday, September 2nd, and that claimant would return to his work on said date at his regular salary or wage of $15.00 per week.

Upon the foregoing admission and agreements the Commissioner finds that temporary total disability will end on September 2, 1929, and that the defendants are due the claimant a balance of four weeks' compensation at the rate of $9.00 per week, making a total compensation of $81.00, and award for said amount, together with all medical and hospital bills is ordered.

Upon the issue of compensation for facial or bodily disfigurement it appears from the evidence that claimant was badly burned on the face, hands and neck to the extent that they were at on time white and badly discolored; that almost normal color has returned to his face and neck but the hands remain badly splotched; that the question of permanent disfigurement can not be determined for several months.

It is thereupon ordered that the claim for compensation for facial and or bodily disfigurement be and the same is continued and this cause is retained for further hearing and order.

Each party will pay his or its own costs.

[Docket No. 13]

T. A. HOLLIFIELD, Employee, Plaintiff, v. BRIGGS-SHAFFNER COMPANY,
Employer, and AMERICAN MUTUAL LIABILITY
COMPANY, Carrier, Defendants

Filed September 28, 1929

HERNIA.—Where it is shown that hernia did not result as required under Section 2 (r) of the Act by meeting the five requirements thereof, claim for compensation is denied.

Hernia will only be considered an accident where it is real traumatic hernia resulting from the application of force directly to the abdominal wall either puncturing or tearing the wall.

Opinion by ALLEN, Commissioner.

This was a claim from Forsyth County, filed by plaintiff for compensation for hernia. The defendants denied liability upon the grounds that plaintiff had not sustained injury in the course of his employment and had no hernia or rupture resulting from injury by accident arising out of and in the course of his employment.

It was admitted that plaintiff was in the employ of the defendant Briggs-Shaffner Company, at the time of the alleged injury, and that his average weekly wages at the time were $35.75 per week.

Plaintiff testified that on July 11, 1929, about 3 o'clock in the afternoon, he and one James McDowell, a fellow employee, were engaged in lifting a moulding flask weighing from 350 to 400 pounds; that McDowell was a heavier and taller man than he (claimant), thus causing a greater part of the weight to fall upon claimant; that he felt a hurting in his side and complained of it to James McDowell and J. S. Holderfield; that he finished up the job he was then working on and continued to work on until 5:30 oclock in the afternoon which was the regular quitting time; that he did not report any injury to his foreman that afternoon; that he did not work the following day; that on Saturday afternoon following the alleged accident on Thursday he went to his family physician Doctor McNally; that on the Monday following he reported his injury to his employer and went to work and continued for a part of the week.

Plaintiff then offered Dr. W. J. McNally, his family physician who testified that he made examination of plaintiff and that the only injury he could find was a dilation and that he could not make out a hernia; that he doubted if dilation could arise from lifting heavy weights; that he (Dr. McNally) had practically the same trouble and that his dilation never gave him pain; that he was accustomed to lifting his patients without inconvenience or pain; that persons do not lift with the belly wall and that in his opinion plaintiff could lift as much then as he ever could; that in his opinion the pain suffered by plaintiff was psychological.

The defendant offered Dr. J. T. Burrus, of High Point, who testified that he examined plaintiff on August 15, 1929, and that he went over the abdominal wall very carefully and found no hernia and no enlargement on either side; that plaintiff complained of suffering pain and that in his opinion he was suffering pain.

There was other evidence tending to corroborate plaintiff as to the alleged injury and suffering.

Section 2 (r) of the North Carolina Workmen's Compensation Act provides:

"In all claims for compensation for hernia or rupture, resulting from injury by accident arising out of and in the course of the employee's employment, it must be definitely proven to the satisfaction of the Industrial Commission:

1. That there was an injury resulting in hernia or rupture.
2. That the hernia or rupture appeared suddenly.
3. That it was accompanied by pain.
4. That the hernia or rupture immediately followed an accident.
5. That the hernia or rupture did not exist prior to the accident for which compensation is claimed.

The Commissioner is unable to find from this evidence that all or even any one of the five requisites have been definitely proven to the satisfaction of the Commissioner.

On the other hand, the contrary has been established by the great weight of the evidence and the Commissioner finds as a fact plaintiff has sustained no rupture or hernia resulting from an accident arising out of and in the course of his employment.

Hernia will only be considered accidental under the North Carolina Workmen's Compensation Act where there is real traumatic hernia resulting from the application of force directly to the abdominal wall, either puncturing or tearing the wall.

All other cases will be considered as either congenital or of slow development, being a disease rather than an accidental injury, unless conclusive proof is offered that the hernia was immediately caused by sudden effort or strain.

It is therefore ordered that an award issue in this case denying compensation and medical and hospital fees, and directing that plaintiff pay the cost of the hearing.

[Docket No. 5]

JAMES CURLEY, Employee, Plaintiff, v. ATLANTIC BITULITHIC COMPANY, Employer, Defendant

Filed September 28, 1929

Green Stick Fractures.—An injury of this nature always results in deformity and will not assume normal shape without external manipulation and force. Such condition would be shown by X-ray.

Termination of Disability.—Where the evidence shows that some condition other than the accidental injury is causing disability the award will be for termination of disability in accordance with the greater weight of the evidence.

Opinion by Allen, Chairman.

This was a claim from Forsyth County, heard before Allen, Commissioner, on August 27, 1929.

It was admitted that plaintiff was in the employ of the defendant on July 8, 1929, the date of the alleged injury; that his average weekly wages at the time of the alleged injury amounted to $13.75 per week; that plaintiff had received $8.25 per week for four weeks, this amount being sixty per cent (60%) of $13.75; that the defendant had paid for the medical services to plaintiff up to and including August 9, 1929; that on August 9, 1929, the attending physician and surgeon pronounced that the plaintiff had completely recovered from his injury and was able to return to work.

On August 14, 1929, the defendant made application to stop payment of further compensation upon the grounds that plaintiff had been dismissed by the attending doctor and was able to return to work.

On August 16, 1929, plaintiff filed request that his claim be assigned for hearing upon the grounds that he was unable to return to work.

With the foregoing admissions there appears to be but two questions at issue between the parties, to wit:

1. Diagnosis of plaintiff's injury.
2. Extent of injury and disability of plaintiff.

These two questions may be considered together.

The plaintiff contended that at the time of the hearing he was unable to return to work and continued to suffer with pains in his side and offered in support of his contention Dr. Tuttle, a practicing physician of Winston-Salem, who testified that he first examined the plaintiff on or about August 8, 1929, and that plaintiff told him about an injury in his side and that the plaintiff seemed to be suffering from soreness on deep breathing, due to some injury to the lung, probably a fractured rib. Dr. Tuttle testified that he had not had an X-ray made, and that if he had had an X-ray it would have probably shown a fracture. He further testified that he examined the plaintiff again on the day before the hearing and that his condition was improved, but that he was not completely well, and that in his opinion the plaintiff would not be able to return to work for two weeks or longer.

The defendant, on the other hand, contended that the plaintiff had completely recovered from any injury that he may have sustained, and offered in support of this position the evidence of Dr. Don C. Eskew who testified that he examined the plaintiff within thirty minutes of the alleged accident and that plaintiff claimed to have twisted his shoulder in loading railroad rails into a car, and that he immediately experienced difficulty in breathing on the left side; that plaintiff complained of pain along the left auxiliary line and crepitus rales, pain on deep inspiration. He further testified that the temperature of the patient at the time was one hundred and his pulse eighty-two; that he had an X-ray made and found no evidence of any fractured or dislocated rib; that he advised plaintiff at intervals and on all subsequent visits found temperature and pulse normal; that he treated plaintiff by strapping and administering narcotics to relieve pain; that he treated plaintiff for a fractured rib regardless of the X-ray picture, but that in his opinion the pain which the patient claimed to have had was not due to fracture but to a pleurisy, which the patient, in all probability had before the injury; that on July 13, five days after the alleged injury plaintiff removed strapping from his chest and stomach without authority and contrary to instructions; that a person suddenly injured who is normal before the accident should not run a temperature of one hundred and a pulse of eighty-two; that in his opinion plaintiff was able to have returned to work on August 5 or 6.

Upon consideration of the foregoing evidence, along with all of the other evidence, the Commissioner is of the opinion and finds as a fact that the plaintiff had fully and completely recovered from any alleged injury on August 9, 1929, and that he is not entitled to compensation for any additional period of time.

According to the medical authorities a green stick fracture is a true incomplete break. The bones most frequently so broken are the radius, ulna, clavicle and ribs. It arises from indirect force and is very rare after the age of sixteen. It is called "green stick" because the bones break like a green stick when forced across the knee, first bending and then breaking on this convex surface. The fracture is usually caused by indirect force. It would seem that if this plaintiff had a green stick fracture of the tenth rib it must necessarily have been caused by muscle violence which would make the convex surface point outward causing a crack of the bone on the outward side, leaving the inside of the rib smooth, thereby doing away with all chance of injury to underlying structures, namely the plura and lung, so that this type of injury would be unable to account for the pleurisy or the later blood raising which the patient seemed to have had.

According to the definition of a green stick fracture, a deformity is formed. We have no record of any break in the normal curve of this rib at the time of the plaintiff's examination thirty minutes later. It is conceivable that the rib could have been cracked and sprung back into its former shape, but if it had been a green stick fracture of any degree with the convex surface of the rib breaking, it would not have likely assumed its normal shape without external minipulation and force, and if this latter condition had been true it should have shown in the X-ray. It is easily seen how one could have a linear (a crack) fracture with no deformity which would have been seen in the X-ray. Such a fracture would not have damaged any underlying structure.

It was testified to by Dr. Eskew, and the Commissioner so finds as a fact, that the fracture of a rib which will not show in an X-ray would easily be amenable to treatment by strapping, in three to four weeks, and would not leave weakness and fatigue, whereas pneumonia and pleurisy might be prolonged, although it isn't usually the case, and leave weakness and lassitude.

Upon the foregoing finding and conclusions, it is ordered by the Commission that an award be made against the defendant to pay to the plaintiff compensation for total disability from July 8, 1929, to August 9, 1929 at the rate of $8.25 per week, and that the defendant pay all medical and surgical services including fees to Dr. Tuttle, the plaintiff's physician, up to and including August 9, 1929.

It is further ordered that each party will pay his or its own costs.

[Docket No. 12]

E. D. HOLTZCLAW, Employee, Plaintiff, v. CAROLINA MINING COMPANY, Employer, GLOBE' INDEMNITY COMPANY, Carrier, Defendants

Filed September 30, 1929

Jurisdiction.—Where accident occurs prior to effective date of Act claim will be dismissed.

Hearing by J. Dewey Dorsett, Commissioner, at Bakersville, Mitchell County, N. C., on September 6, 1929.

Plaintiff represented by *Hon. W. C. Berry*, Attorney, of Bakersville, N. C.

Defendants represented by *Mr. Garland*, Attorney, of Gastonia, N. C., and *Mr. Schenck*, Insurance Adjuster, also of Gastonia.

Opinion by DORSETT, Commissioner.

Statement of Case

The hearing of this case was set on motion of the Industrial Commission, subsequently, however, the defendants filed a request for a hearing.

There are several questions to be determined, the foremost one is the date of the accident involving, therefore, the jurisdiction of the North Carolina Industrial Commission.

The North Carolina Workmen's Compensation Act was ratified the 11th of March, 1929, sections 51 to 55, inclusive, and section 75 to become effective May 1, 1929, all the remainder of the Act to become effective July 1, 1929. The Act as relates to the employer and his employee went into effect on July 1, 1929.

This plaintiff denies the jurisdiction of the Industrial Commission on the ground that the accident resulted in his injury which occurred on June 28, 1929, a few days before the compensation law went into effect. It was his contention throughout the hearing that he was injured on June 28. He states that he was injured on that date, after the lunch hour, while engaged in his work for the Carolina Mining Company; that his job was at the time of the injury breaking rock with a 24-pound hammer, and he claims that while so engaged a piece of this rock struck him in the left eye causing his present disability. He further states that the reason he is absolutely certain of the date of the injury is because he put the date down in the almanac when he got home after finishing the day's work. To substantiate the contention he brings his sister and brother-in-law, with whom he was living, and their undisputed testimony is that both were told by this plaintiff on June 28 that he had been hit in the eye that day by a piece of stone and was injured while working for the Carolina Mining Company; that he told both of these parties about this that night and Mrs. Smith, his sister, states that she looked in his eye and saw something in it and suggested to this plaintiff that he get a doctor.

On cross examination by Mr. Schenck the plaintiff says he felt the piece of stone strike his eye and that it pained him some and bothered him to some extent at the time. The plaintiff further states that he worked for some few days after being injured and that the eye hurt him some. In his own words he says, "just pained and watered." The plaintiff said the reason he put the date of the injury down was because he "allowed that maybe there might get up some dispute some way or other."

The first time the plaintiff saw a doctor about his eye was on July 15. It is in evidence that this plaintiff worked from the time of his injury until July 6, then this plaintiff laid out for a week because of a rising on his hip and he returned to work on Saturday, July 13.

One, Coy Cox, foreman for the Carolina Mining Company, testified that he was the immediate boss over this plaintiff on June 28 and that the plaintiff works under him when on the job; that he saw this plaintiff on June 28 and he also saw him every day that this plaintiff worked between June 28 and July 6; that this plaintiff worked from June 28 until July 6 and during this time the plaintiff had said nothing to him (the foreman) about being injured and that he himself had noticed nothing wrong with the plaintiff's eye; that the first time he noticed anything wrong with the plaintiff's eye was on July 13, one week after the plaintiff had stopped work on July 6. The only time he saw the plaintiff between July 6 and July 13 was on July 10 when this plaintiff came back after his pay check. It is of record that the cause of the week's lay off was due to a rising on the plaintiff's hip. This foreman, Cox, further testified that he noticed nothing wrong with the plaintiff's eye on July 10 and that the plaintiff said nothing to him about his eye being injured. The first time that the foreman noticed anything wrong with the plaintiff's eye was on July 13, he said that the eye looked red and that water was running from it and he asked the plaintiff what was wrong with his eye and got for an answer that he had a rock in it. Mr. Cox then advised the plaintiff to see a doctor and the plaintiff replied that his eye never hurt him much. The plaintiff worked on the 13th and came back on Monday, the 15th, and was sent to a doctor. The plaintiff had never requested any medical aid until July 15.

Mr. Cox testified that the plaintiff told him that his eye got hurt on June 28 and that on the 13th the eye was so red that he could see it without close inspection. That he (the foreman) reported the accident on the 13th or 15th but he didn't know when it happened; his own words are "on the 13th was the first time I noticed it, that was the only thing I could put in my report, I just reported what I noticed and not what he (the plaintiff) told me. Mr. Cox further testified that the character of this plaintiff is good and that the character of Mr. and Mrs. Smith is good.

A fellow employee, one Milt Letterman, testified that he worked for the Carolina Mining Company, that he worked on June 28 and through July 6 along with this plaintiff; that he was working some four or five feet from him (the plaintiff) and he "never noticed anything wrong with the plaintiff's eye" nor did the plaintiff ever complain to him about any trouble with his eye; that the first time he knew anything about the injury to this plaintiff's eye was on July 13 when he saw Mr. Cox looking at the plaintiff's eye. This witness said he did not know when the injury happened to the plaintiff's eye.

Dr. C. F. Lambert was the first doctor to see this plaintiff with reference to his injured eye. Dr. Lambert testified that he saw the plaintiff on July 15; that his (the plaintiff's) eye was red and inflamed and the lids were glued together and that at first he was unable to see anything in the eye but by using a magnifying glass he saw two small foreign bodies in the eye and after instilling a few drops of cocaine solution these foreign bodies were lifted out, the particles were so small that the doctor could not see what they were; that at the time of this first examination there was considerable inflamation. This doctor testified that since he was not an expert he advised the plaintiff to go to see an eye specialist in Asheville.

The doctor was asked these questions:

Q. Doctor have you an opinion satisfactory to yourself as to how long it would have taken Holtzclaw's eye to have gotten in the condition it was when you first saw him? A. I don't think it would be possible to state.

Q. One day? A. Longer than one day.

Q. Would you say longer than a week? A. No sir.

Q. Have you an opinion satisfactory to yourself that this injury could have occurred on July 13 with reference to the condition of the eye as you found it on the 15th? A. I couldn't say that it didn't occur then.

Q. As a medical man would you say it was impossible for it to have occurred on July 13? A. No sir, I would not say that.

Q. In your opinion, Doctor, if that had been in there from June 28 until the time you saw him seventeen or eighteen days later, wouldn't that have caused him severe annoyance? Do you think a man would be able to carry on his work and work full time with that thing in his eye? A. I don't believe some men could work with a foreign body in their eye for the length of time he says this has been in there; some people are more sensitive than others; I do know men can work for several days with a foreign body in their eye and it wouldn't occasion a great deal of discomfort.

Dr. McCall, eye specialist, practicing in Asheville, testified that he treated the eye of this plaintiff; that the first day he saw this plaintiff was on July 25, 1929; that in his opinion there is a loss of vision from 80 per cent to 90 per cent; that on September 3, the last time he saw this plaintiff the vision was 20/30 in the right eye and 20/200 in his left eye; that every indication of inflammation had subsided.

Dr. McCall testified that any foreign particle in the eye could be felt the moment it got in there and expected irritation to start up just a few hours after getting such a foreign body in the eye; that the longer the foreign body stays in the eye the more discomfort there would be; that he was unable to state just how long this foreign body had been in the eye from the inflammation that it had set up, but that he could tell what he expected—that it would take only a few days. When pressed for how many days he stated that it is hard to say, it depends on how much infection there is"; that from his experience it was very unusual for particles to stay in the eye for that length of time and not set up inflammation that would be noticeable to people in close proximity or people working with him. Dr. McCall further testified that it was possible for an object to be in the eye and be washed from one corner to the other and not lodge for some time before it works into the eye and, of course, there would not be much discomfort or pain until the object got back on the eye-ball, but that they didn't expect that to happen.

He further testified that some individuals do not complain as much as others, and that it is possible to go several days with a foreign body in one's eye without much discomfort.

From all of the evidence in the case the commission makes the following

Findings of Fact

1. In *State v. Murray*, 139 N. C., we find the following:

The law says that it is your duty to give to positive testimony greater weight than you give to negative testimony. The testimony of those witnesses who swore positively that they saw the pistol in the hand of the prisoner and that he fired the fatal shot while the pistol was in his hand, is what the law terms positive testimony. They swear positively that they saw the existence of a fact, and the testimony of those witnesses who said they saw the prisoner and the deceased struggling at the time at when the last shot was fired but they did not see the pistol and did not know in whose hand the pistol was, is what the law terms negative testimony.

The reason the law gives greater weight to positive testimony than to negative testimony is because the witnesses who swore to positive testimony swore to what is a fact, an existing fact or else they deliberately swore to a falsehood, while those who swore to negative testimony may be telling the truth and yet a fact may exist which they did not see.

If one witness swore that he saw Sheriff Markham in the Court House at Durham on a certain day, the Sheriff was there or else the witness told a lie. Another witness might say he was in the Court House on that occasion but he did not see Sheriff Markham in there. That witness may be telling the truth and may be conscientious and yet it may be a fact, notwithstanding, that Sheriff Markham was in the Court House, and for that reason the law says you must attach greater weight to positive testimony than to negative testimony.

This plaintiff, whose character was not impeached, testified positively that he was injured on June 28, that he made a record of it, and to corroborate this he brings in two witnesses, whose character is good, who testified positively that on June 28 this plaintiff complained of an injury to his eye. One of these witnesses examined his eye; saw something in it, and both of these witnesses saw this plaintiff make a note of the fact in the almanac. There was no positive testimony from the two doctors that examined this plaintiff, nor from the foreman, with reference to when the injury happened. Therefore, the Commission finds as a fact:

1. That the injury occurred on June 28.
2. That the compensation law did not go into effect in North Carolina until July 1, 1929.

Conclusions of Law

1. The Industrial Commission has no jurisdiction in this cause.
2. Each party to bear its own costs.

[Docket No. 22]

LAWRENCE MONTGOMERY, Employee, Plaintiff, v. CAROLINA STEEL AND IRON WORKS, Employer, MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed September 30, 1929

ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT.—Accidental injury occurring on trip from place of work to home not compensable—nothing else appearing.

Hearing before J. DEWEY DORSETT, Commissioner, September 27, 1929, at Greensboro, N. C., Guilford County.

The plaintiff appeared in person.

The defendant employer was represented by *Mr. McLenna*, of the Carolina Steel and Iron Works, and the defendant insurance carrier was represented by *Mr. W. C. Ginter*, of Charlotte, N. C.

Opinion by DORSETT, Commissioner.

Statement of the Case

Compensation is claimed in this case by the plaintiff, Lawrence Montgomery, on account of an injury by accident occurring on the way from his place of employment to his home. The evidence is this plaintiff was returning home, after completing his day's work, and was about eight or nine miles from the employer's place of business when for some cause or other he wrecked the car in which he was riding and sustained severe injuries from the accident. It is the undisputed evidence of all the witnesses that the defendant the Carolina Steel and Iron Company did not furnish transportation for this plaintiff, and that this plaintiff was on no errand for the defendant, but was merely returning home from work when the accident happened.

Dr. Holt, who happened to be present when the accident took place, testified that the plaintiff was severely injured; that his jaw-bone was broken in two or three places, and that he suffered injuries about the face which left scars that will probably be permanent.

From all the evidence the Commission makes

Findings of Fact

1. The accident causing the injury and disability to the plaintiff, Lawrence Montgomery, did not arise out of and in the course of the employment.

Conclusions of Law

Injury as defined by the North Carolina Workmen's Compensation Act as injury or personal injury shall mean only injury by accident arising out of or in the course of the employment, and shall not include disease in any form except where it results naturally and unavoidably from an accident. The case is dismissed; each side will pay its own costs.

[Docket No. 19]

JUNIUS HERBERT SMITH, JR., Employee, deceased, J. H. SMITH, HETTIE HARRIS SMITH, CHAROTTE H. SMITH, LACY E. SMITH, HELEN L. SMITH, W. DANIEL SMITH, Plaintiffs, v. CAROLINA POWER & LIGHT COMPANY, Employer, Self-Insurer, Defendant

Filed September 30, 1929

Fatal Cases.—Under Section 38 of the Act dependents partially dependent upon deceased employee entitled to the proportion of the amount due wholly dependents as the amount contributed by employee to partial dependents bears to the annual earnings of the deceased.

Hearing before Commissioners Dorsett and Wilson, at Oxford, N. C., on September 23, 1929.

Plaintiffs appeared in person.

Defendant represented by *Mr. L. G. Benford*, of the Legal Department of the Defendant Company.

Opinion by Dorsett, Commissioner.

Statement of the Case

The minor son of plaintiff was killed in the course of his employment with the defendant. It is admitted that there was an accident resulting in the death of Junius Herbert Smith, Jr., and that the accident arose out of and in the course of the deceased's employment; that the deceased was regularly employed by defendant Carolina Power & Light Company; that the deceased and the defendant were both subject to the provisions of the North Carolina Workmen's Compensation Act, and that the average weekly wage being earned by the deceased at the time of his death was $18.11 per week for a five and one-half day week.

The evidence in the case shows that the deceased had at one time been a student of a junior college in the State and that he contemplated entering a university in Chicago this fall; that he had been working for this defendant since about the first day of February, 1929, and that he stopped school just before the Christmas holidays of 1928. The evidence is that this young man for quite a period of time has helped to support his mother by contributing sometimes as much as ten dollars per week, some weeks eight, and some weeks five dollars. In any event he contributed to the support of his mother as much as he could from the money that he was earning, and the evidence shows that he had supported his mother and was supporting her at the time of the accident, and for three or four months prior thereto. In addition to the weekly amounts that he gave in cash, it is in the evidence that from time to time he would pay up some small accounts that his mother had made.

The father of this young man, J. H. Smith, testified that he had not received from this young man any money at all; that the boy made the payments to his mother. It is also in evidence that the deceased from time to time gave his sisters some money. In the words of his mother: "He was so generous that he was always giving them something."

From all of the evidence the Commission makes the following

Findings of Fact

1. That on August 29, 1929, at about 2:35 p.m., Junius Herbert Smith, Jr., was accidentally killed while in the employ of the defendant Carolina Power & Light Company as a "ground man," at an average weekly wage of $18.11 per week, the accident resulting in death, arising out of and in the course of his employment.
2. The deceased, at the time of his death, was unmarried and was twenty years of age, leaving no dependents wholly dependent upon him.
3. That the deceased lived away from home and contributed nothing as board; that the mother is the business head of the household and depended on this decedent son for partial support to the extent of $8.00 per week.
4. Money paid to any of the children by the deceased constituted a gift.
5. J. H. Smith, the father, is neither wholly or partially dependent on his decedent son.
6. The parties, plaintiff and defendant, to this proceeding are bound by the North Carolina Workmen's Compensation Law.

Conclusions of Law

1. The plaintiff, Mrs. Hettie Smith, being the sole partial dependent, is entitled to compensation under Section 38 of the North Carolina Workmens Compensation Act of 1929 as relating to partial dependents.

Award

It is ordered that the defendant, Carolina Power & Light Company, pay to the plaintiff, Mrs. Hettie Smith, as the sole partial dependent and mother of Junius Herbert Smith, Jr., deceased, compensation at the rate of four dollars and seventy-eight cents ($4.78) per week payable weekly for a period of three hundred and fifty (350) weeks, beginning from August 29, 1929, and funeral expenses in the amount of two hundred ($200.00) dollars, together with the costs of this hearing.

Vol. I Pages from 41 to 72

ADVANCE SHEETS

OF

OPINIONS IN CASES

HEARD AND DETERMINED
BY THE

NORTH CAROLINA INDUSTRIAL COMMISSION

RALEIGH

NOVEMBER, 1929

OPINIONS TO NOVEMBER 1

SUBSCRIPTION PRICE $5.00 PER YEAR
IN ADVANCE

PUBLISHED FOR THE COMMISSION
BY
EDWARDS & BROUGHTON COMPANY
RALEIGH, N. C.

Admission applied for as second-class matter November 12, 1929,
at the post-office at Raleigh, North Carolina,
under the Act of March 3, 1879.

PUNCHED TO FIT BINDER SUPPLIED BY EDWARDS & BROUGHTON COMPANY, RALEIGH

INDEX

Case *Page*

Lewis H. Johnson *v.* Asheville Hosiery Company et al. 41

John Thompson *v.* Fogle Brothers et al. 45

Eva Fetherson *v.* The New Way Laundry et al. 47

Wade O. Conrad *v.* Cook-Lewis Foundry Company et al. 49

Eva Fetherson *v.* The New Way Laundry et al. 50

Dewey Daniels *v.* Asheville Paving Company et al. 52

Thomas Poston *v.* American Enka Corporation et al. 53

J. J. Sides *v.* Stanly County Road Board et al. 54

June Bryant *v.* J. J. McDevitt Company et al. 56

Claude Watson *v.* Cannon Mills Company. 58

W. L. Fowler *v.* Progressive Painting and Decorating Company et al. 60

Harvie N. Morgan *v.* Town of Smithfield et al. 61

Wade H. Durham *v.* State Highway Commission. 62

J. P. Southern *v.* Morehead Cotton Mills Company et al. 65

NORTH CAROLINA INDUSTRIAL COMMISSION

MATT H. ALLEN, CHAIRMAN
J. DEWEY DORSETT
T. A. WILSON
COMMISSIONERS

E. W. PRICE, SECRETARY

ELEVENTH FLOOR RALEIGH BANK & TRUST BUILDING
RALEIGH, N. C.

[Docket No. 17]

LEWIS H. JOHNSON, Employee, Plaintiff, v. ASHEVILLE HOSIERY CO., Employer, MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed October 1, 1929

INDEPENDENT CONTRACTOR.—Where the facts found show that the employment was to be paid for by the hour and the employer retains sufficient direction and control of the work to establish relationship of Master and Servant, the employment is not that of independent contractor.

COVERAGE.—Policies of insurance issued covering an employer's compensation liability under Section 71 is an agreement to pay persons entitled to compensation all benefits covered by the Act.

CASUAL EMPLOYMENT.—Where the work being done is a part of the usual course of the trade, business, profession or occupation of the employer, the length of time in which the employee was engaged on the work prior to the accident does not make the employment casual.

Hearing before J. DEWEY DORSETT, Commissioner, on September 20, 1929, at Asheville, Buncombe County, N. C.

Plaintiff represented by *Mr. Lee*, of the firm of *Lee, Ford & Coxe*, Attorneys, of Asheville, N. C.

The defendants were represented by *Mr. Baer*, the employer, and *Mr. M. L. Page*, for the Maryland Casualty Insurance Company, Carrier.

Opinion by DORSETT, Commissioner.

Statement of Case

The Plaintiff is a painter by trade, he was employed by the Asheville Hosiery Company, at the time of the injury, to do some painting on the inside of the factory at Asheville.

It is admitted that the injury occurred from an accident arising out of and in the course of the plaintiff's employment, that neither of the parties, the plaintiff or defendant, have rejected the provision of the North Carolina Workmen's Compensation Law, and that there is no claim of default in the notice of hearing or of the accident.

The insurance carrier denies liability in the instant case on the following grounds:

1. That the employment was casual.
2. If there was any employment the plaintiff was an independent contractor and therefore not entitled to compensation benefits from his principal.
3. That the policy written for the defendant employer covers hosiery manufacturing and not painting—a question of coverage.
4. The question of average weekly wages is also raised.

The defendant, the Asheville Hosiery Company, is a manufacturer of hosiery and engaged Lewis Johnson, this plaintiff, to do some painting on the inside of the mill. Johnson was to be paid $1.25 per hour, the defendant furnishing all material and some additional help to assist Johnson. The job was to be done at odd times in order not to interrupt production, and was done at night, on Saturday afternoons and Sundays. While engaged in this work between the hours of mid-night and 2:00 o'clock on July 14 the injury resulting in the plaintiffs present disability, for which he is asking compensation, occurred. It is in evidence that the injury was caused by the plaintiff stepping backwards off of a scaffold and falling some twelve feet to the floor, breaking two bones in his left foot and causing minor injuries to his back and one of his arms.

This plaintiff's evidence is that at the time of the injury there was no written contract or agreement concerning this job. (It is in evidence, however, that after the injury and before the job was completed there was a written contract entered into with reference to this job, but we are not now particularly interested in this contract since it did not exist at the time of the injury.) This plaintiff states that he went to the Asheville Hosiery Mill for the purpose of fixing a certain "spray gun" and while there for that purpose Mr. Baer, an official of the Asheville Hosiery Mill, hired him to do this painting, asking this plaintiff how much he would do the work for, and getting for an answer "$1.25 an hour." The paint was furnished by the defendant employer and this plaintiff was paid only for the number of hours that he worked, and the work was done on Saturdays, Sundays, and at night.

In answer to the question "what caused you to fall or step from the scaffold?" this plaintiff answered, "I could not see well enough and stepped too far over the end of the scaffold." Since the injury this plaintiff has not been able to work. It is in evidence that the plaintiff ordinarily worked with his father and with any contractor with whom he could get a job.

When this work was started there was no estimate of how long it would take to complete the job or just how much painting there was to be done. The plaintiff further testified that when he started work there was no contract; he just told Mr. Baer that he would do the work for $1.25 an hour; that there was no time limit set to complete the work and nothing said about how long it would take to do it. The plaintiff testified that at all times he was subject to the control of his employer and that his employer told him from time to time "where to start and things like that," and that if he was painting in one end of the mill and the employer wanted him in the other he so requested that the change be made. The plaintiff further testified that medical attention was furnished at the request of the plaintiff, but that the night watchman on duty at the time this injury occurred asked this plaintiff if he wanted him to call a doctor. This plaintiff further testified that he had not refused compensation, and in a conversation with Mr. Baer concerning medical bills, Mr. Baer instructed this plaintiff to take the bills up to his insurance carrier, the Maryland Casualty Company; that these bills for medical services were presented to this insurance carrier by the plaintiffs father.

Dr. J. G. Anderson, who rendered the medical aid to this plaintiff, testified that his examination of the injured foot showed that the plaintiff had fractured the metatarsal bones, and that there was considerable deformity of the two metatarsal bones; that he put the foot in a plaster of paris cast and expected to get perfect results provided the injured plaintiff would stay off of his foot for a while. In Dr. Anderson's opinion this plaintiff will be totally disabled for five or six weeks and partially disabled for eight or nine weeks, at the end of which time he ought to be able to go back to work; that at the present time he ought not to be on his feet at all; that it has been three weeks since the accident occurred and that the plaintiff ought to stay off his feet three or four weeks longer.

Mr. Baer, an official of the Asheville Hosiery Company testified that there was some painting to be done in the mill; that his own men usually did the painting; that they wanted to paint the ceiling of the mill white in order that a little more light would be reflected. To do this job of painting they secured from the Asheville Paint Company a gun and they intended to operate this themselves but were unable to get the gun to work, and called up the Asheville Paint Company and requested that they bring out a man who could fix the gun. Mr. Lewis Johnson, this plaintiff, went out to fix the gun and worked on the same for quite a while, and finally succeeded in getting the gun to work satisfactorily, and he asked Mr. Johnson if he would do the work for them, inquirying at the time what his charges would be, and that Mr. Johnson agreed to do the work for $1.25 an hour. He further testified that he told this plaintiff that the work had to be done when the machines were not running, and it would have to be done on Saturday afternoons, Sundays and at night. Mr. Baer further testified that when he was informed that an accident had occurred injuring Mr. Johnson he reported the matter to his insurance carrier through the National Bank of Commerce. It is also in evidence that the defendant employer received a bill from the French Broad Hospital in the name of Lewis Johnson. This bill was turned over to Mr. Johnson with instructions that he see the insurance people. $25 was advanced to Mr. Johnson by this defendant.

In answer to questions by Mr. Lee, the plaintiff's attorney, Mr. Baer testified as follows:

Q. Mr. Baer did you exercise some supervision over Mr. Johnson's work?

A. I exercised very little. Mr. Schulz (also an official of the mill exercised more than I did, but between us very little. I told him when to paint and where.

Q. You told him where to paint and when?

A. That's right.

Q. Did you furnish men to help him with the light?

A. To help him with anything that was to be done.

Q. You had the right, under the verbal contract, to discharge him at any time you saw fit, if you didn't like the way the work was progressing.

A. Under the verbal part, yes sir.

Q. The written contract was not entered into until after the accident?

A. Yes Sir, after the accident.

Mr. Baer further testified that all materials were furnished by the Asheville Hosiery Company; that they had a store of paint and if he needed any it was given to him, as this was the most economical way to have the painting done. Mr. Baer further testified that this was the first occasion his company had had to do any painting; that he doesn't know how often it will be necessary to paint the plant incidental to the manufacture of hosiery. His answer to a question concerning this is; "Yes Sir, it would be a part of the maintainance of the mill, the same as it is necessary to keep the roof painted."

This plaintiff was further examined and testified that his regular charges were $1 an hour, and time and one-half for overtime; that he had a considerable amount of painting during the Summer, Spring and Fall, but hardly any at all in the winter, and that on an average he made around $1,000 to $1,500 a year.

From all the evidence in this case the Commission makes the following

Findings of Fact

1. That on July 14, 1929, and a few days prior thereto the plaintiff, Lewis Johnson, was an employee in the regular course of the business of his employer, the Asheville Hosiery Company; the defendant employer named above, his employment being that of a painter and his average weekly wages in excess of $30.

2. That on July 14, 1929, the plaintiff was injured, the said injury resulting from an accident arising out of and in the course of said employment.

3. Both parties, plaintiff and defendant, are bound by the provisions of the North Carolina Workmen's Compensation Act.

4. The Maryland Casualty Insurance Company is the compensation carrier, and is intervening as a party defendant.

Conclusions of Law

From the foregoing findings of facts we conclude:

1. That the plaintiff was not a casual employee and, therefore, is not excluded from the provisions of the act. Under section 2-B "excluding persons whose employment is part casual and not in the course of trade, business, profession or occupation of his employer." The evidence in Findings of Fact No. 1, the employer testified it was a part of his business to keep the buildings in good repair and the original intention of this employer was to have his own men do this painting. Whether one is an employee or independent contractor is often a close question, the control in the instant case was with the defendant, there is sufficient direction and control in the present case to establish the relation of master and servant.

2. The contention of the defendant, the Maryland Casualty Insurance Company, that its policy of insurance did not cover the liability of the assured for painting but only the compensation liability of the assured in respect to its manufacturing operations is beside the point. Section 71 of the North Carolina Workmen's Compensation Act requires that the policy of insurance shall contain an agreement of the insurer that it will promptly pay to the person entitled to the same all proceeds covered by this act, there is, therefore, no question of coverage involved in this case, it having been found that the plaintiff was at the time of the injury an employee of the Asheville Hosiery Company and that the accident arose out of and in the course of employment.

Award

Compensation shall be paid to the plaintiff at the rate of $18 per week for the period of his total disability, not to exceed 400 weeks, the plaintiff and the defendant to make an agreement at such time as the total disability shall terminate, and should partial disability result thereafter, such partial disability not to exceed 300 weeks from the date of the accident. The defendants to pay the proper parties the entire cost of medical and hospital bills incurred in the instant case.

Each side shall pay its own costs.

[Docket No. 3]

JOHN THOMPSON, Employee, Plaintiff, v. FOGLE BROTHERS, Employer, and INDEMNITY INS. COMPANY OF N. A., Carrier, Defendants,

Filed October 21, 1929.

Hernia.—Where the requirements of Section 2, sub-section (r) not proven, medical treatment and compensation will be denied. Hernia ordinarily a disease, develops gradually. Natural tendency is to try to explain the existence of hernia by some unusual circumstance, such as slipping or lifting etc. Real traumatic hernia is compensable, necessitating application of force sufficient to puncture or tear abdominal wall, accompanied by severe pain and immediate disability necessitating medical treatment.

Hearing before Matt H. Allen, Chairman, at Winston-Salem, N. C., August 27, 1929.

Claimant appeared in person and was represented by one *E. L. Crouch.*
Defendants represented by *Mr. Crews*, Attorney, Winston-Salem, N. C.

Opinion by Allen, Chairman.

Statement of Case

The claimant, John Thompson, was on the First day of July, 1929, and for several months prior thereto, regularly in the employ of the defendant employer, Fogle Brothers. On the morning of July 1, the claimant was engaged in cementing pipes that were being laid in a ditch and about 11:35 a.m. one or both of the top sides of the ditch caved in and, according to the testimony of the plaintiff, covered him with dirt up to his waist.

The plaintiff testified that at the time he felt a little pulling in his side but didn't pay much thought to it; that he worked on and in the afternoon of the same day he felt some pain in his side; that he continued to work on the job until the 12th day of July, and that on the 12th day of July he reported his claim of injury to the foreman; that on or about the 15th day of July he sent for a Doctor and that the doctor diagnosed the case as hernia.

The defendant offered testimony tending to show that the claimant was engaged in cementing pipe in a ditch about eight feet deep and about two and one-half feet wide, and that there was a cave in of approximately a wheel barrow full of dirt and that at the time the claimant was straddling a fourteen inch pipe and that the dirt fell against his leg covering his leg up to his knee on the left side; that the claimant complained of no injury at the time and stated that he was not hurt and continued on the job the balance of that day and up until July 12.

Doctor Munt testified for the defendant that he examined the claimant on July 17, and found that he had a right inguinal hernia about the size of a small egg; that in his opinion a hernia of that size could not have developed from an accident twelve days previous; that a hernia the size of a small egg arising from a direct blow would cause nausea and an immediate cessation of work; that a blow sufficient to cause a hernia as large as the one which the claimant has would render the person incapacitated for work; that in his opinion if the claimants hernia had been caused by the fall of this dirt it would have been accompanied by immediate pain.

It was admitted that the plaintiff was in the employ of Fogle Brothers and there was evidence tending to show that his average weekly wage was Eighteen ($18) Dollars per week and the Commissioner so finds.

Findings of Fact

From all of the evidence the Commissioner finds the following facts:

1. That on the first day of July, 1929, the claimant was in the employ of the Defendant, Fogle Brothers.
2. That the average weekly wage of the claimant was Eighteen ($18) Dollars per week.
3. That the hernia complained of was not the result of an accident arising out of and in the course of his employment.

Conclusions of Law

Sub-section "r" of Section 2 provides, among other things, that hernia or rupture must appear suddenly and must be accompanied by pain and that the hernia or rupture must immediately follow the accident.

The commission is of the opinion that neither of these three requirements is met by the evidence in this case.

In the case of Hollifield vs. Briggs-Shaffner Company (Docket No. 13) filed September 23, 1929, the Commission said "Hernia will only be considered accidental under the North Carolina's Workmen's Compensation Act where there is real traumatic hernia resulting from the application of force directly to the abdominal wall, either puncturing or tearing the wall. All other cases will be considered as either congenital or of slow development, being a disease rather than an accidental injury, unless conclusive proof is offered that the hernia was immediately caused by sudden effort or strain."

It seems to be well settled in the medical profession that hernia is a disease that ordinarily develops gradually. The medical profession seems to be also in agreement that very many persons have a predisposition or congenital condition that often develops in hernia independent entirely of any accident. Most such persons frequently find that hernia has developed while the person is incapacitated in his ordinary occupation, and the natural tendency is to try to explain the existance of the hernia by some unusual circumstance such as slipping or lifting or some other circumstance of similiar nature.

In order to discriminate between that class of hernia, which is in the nature of a disease with slow development, and a real traumatic hernia that is compensable certain rules of evidence have been adopted in various states, sometimes in statutory form and sometimes as rules defined by the courts or

Commission to establish a traumatic hernia that is compensable. Among these requirements it is necessary to show some accidental strain or the application of force directly to the abdominal wall sufficient to puncture or tear the same, and that the appearance of hernia accompanying such strain or application of force with serious pain and immediate disability so that medical treatment is necessary and that the employer be notified within a short time of the alleged hernia.

In the present case there is no evidence of the application of force directly to the abdominal wall, and no evidence that the hernia accompanied the blow caused by the cave in of the ditch wall, and no evidence of serious pain immediately following the cave in, and no evidence of report to the employer of the alleged hernia until twelve days had elapsed.

In all claims for compensation for hernia with incident medical and hospital treatment the burden of proof is upon the claimant to establish—

1. That there was an injury resulting in hernia or rupture.
2. That the hernia or rupture appeared suddenly.
3. That it was accompanied by pain.
4. That the hernia or rupture immediately followed an accident.
5. That the hernia or rupture did not exist prior to the accident for which compensation is claimed.

Upon failure of the claimant to establish any one of the above five requisites the Commission will deny compensation.

Upon consideration of all the evidence it is ordered that an award issue denying compensation and medical treatment and providing that the claimant pay the cost of this hearing.

[Docket No. 23]

EVA FETHERSON, Employee, Plaintiff, v. THE NEW WAY LAUNDRY, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed October 4, 1929

MINIMUM RATE OF COMPENSATION.—Held that the Act provides $7 minimum rate regardless of actual average weekly wage.

SPECIFIC DISABILITY.—Where it is shown that the plaintiff has lost the distal part of the first phalange of the index finger, and the three other fingers at the proximal part of the first phalange, posterior part of hand crushed the thumb being uninjured; award will be the proportion of loss of use of the hand. In this particular case four-fifths of loss of use of hand was awarded.

Hearing before MATT H. ALLEN, Chairman, on September 30, 1929, at Monroe, Union County, N. C.

Opinion by ALLEN, Chairman.

It appearing to the Commissioner in the above entitled cause that on the 12th day of August, 1929, the claimant was injured while in the employ of the defendant, The New Way Laundry Company, by having four fingers on the left hand badly burned and crushed; that on the 26th day of August, 1929, an agreement for compensation was entered into between the plaintiff and defendant. The New Way Laundry Company, by the terms of which defendant agreed to pay to the plaintiff seven ($7) dollars per week for one hundred weeks; that said agreement was in due course submitted to the North Carolina Industrial Commission for approval and award; that on September 13, 1929, the North Carolina Industrial Commission duly approved said agreement and issued award thereon, providing for the payment of $7 per week for 100 weeks. The award and agreement are hereby referred to and made a part of this record.

After the award was made the Industrial Commission received notice of a change in conditions in that the four fingers referred to had been amputated, and the Commission thereupon, on its own motion, and in pursuance of the provision of the Section 46 of the Workmen's Compensation Act, assigned the claim for hearing and review on October 1, 1929, in the City of Monroe, North Carolina, after first giving notice to the plaintiff and to the defendants, The New Way Laundry Company and the Maryland Casualty Company, insurance carrier.

Dr. R. D. Pearson, after first being duly sworn, testified as follows:

Q. Doctor, I believe you are the surgeon who attended Eva Fetherson?

A. Yes Sir.

Q. Did you operate upon her after August 26, 1929?

A. Yes sir.

Q. Will you please describe the condition of her injuries before and after the operation.

A. This patient came under our attention on August 12 with an injury to her left hand, excluding the thumb. It had been caught in a mangle, and the injury sustained was to the extent of a crushed burning wound over the posterior part of the hand. Because of sloffing and infection of these fingers we did not deem it wise to operate until about three weeks after the injury, after which time we did. The four fingers were removed. The index finger was removed the distal part of the first phalanx. The other three at the proximal part of the first phalanx. The thumb was uninjured.

Q. When did you last see this patient?

A. On October 1st.

Q. Have you an opinion satisfactory to yourself as to the proportion of the loss of the use of the entire hand this plaintiff has suffered?

A. Yes. I would say that four-fifths of the funtion was lost.

Mr. W. C. Ginter, attorney for the Maryland Casualty Company, represented the defendants and appeared in person and cross-examined Dr. Pearson as follows:

Q. Doctor, what use will she probably have after it is healed?

A. She would only be able to grasp small objects between the thumb and the stump of the index finger in light manual labor and doing house-work, or working at something of that kind.

Q. In your opinion at this time will there be any tenderness or stiffness in the balance of the hand?

A. I don't think so. There may be some sensitiveness of the stump.

Q. Well, is that sensitiveness a common thing or just particularly in this case?

A. Not particularly in this case but in any amputation there may be some discomfort following an operation. It is not just common to this case.

Q. And you said that she has lost four-fifths of that hand?

A. Yes.

There being no further witnesses the hearing was closed.

[Docket No. 11]

WADE O. CONRAD, Employee, Plaintiff, v. COOK-LEWIS FOUNDRY COMPANY, Employer, and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Carrier, Defendants

Filed October 21, 1929

Review.—Opinion and findings of hearing Commissioner affirmed.

Willful Acts.—Employee may recover for injuries caused by willful acts of third person.

Hearing before the full Commission at Raleigh, N. C., in the Hearing Room of the Industrial Commission, October 18, 1929.

Opinion by Wilson, Commissioner.

This was an appeal from an award by Matt H. Allen, Commissioner.

The facts as set out in the opinion of Matt H. Allen, Commissioner, are hereby adopted by the Commission as the findings of fact by the full Commission.

The appellant on review contends that the Commissioner erred, (1) in that he did not find as a fact that there was an accident, and (2) that under the North Carolina Workmen's Compensation Act the employer is not liable for injury resulting from the willful act of a third person.

Upon the first question the Commission is of the opinion that the hearing Commissioner did find as a fact that the injury was the result of an accident which arose out of and in the course of employment. (See Page 2 of the Opinion of Matt H. Allen, Commissioner, Findings of Fact No. 1).

Upon the second question the Commission is of the opinion that under the North Carolina Workmen's Compensation Act an employee may recover for an injury caused by the willful act of a third person.

The Commission is of the opinion that the findings of fact and conclusions of law set out in the opinion of Matt H. Allen, Commissioner, are proper and justified from all of the evidence and they are hereby adopted as the findings of fact and conclusions of law of the full Commission.

It is, thereupon, ordered and adjudged that the award heretofore issued be and is hereby in all respects affirmed.

[Docket No. 23]

EVA FETHERSON, Employee, Plaintiff, v. THE NEW WAY LAUNDRY, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed October 21, 1929

LOSS OF USE.—Where medical evidence shows, in addition to loss of fingers, a crushed, burning wound over the posterior part of the hand, in addition to specific loss of fingers, award will be for compensation under sub-section (t) of Section 31.

MINIMUM RATE OF COMPENSATION.—Minimum of $7 prescribed by the Act will govern since there is no provision in the Act that where wages are less such wage shall govern.

INSURANCE PREMIUMS.—Judicial notice taken of insurance premium being based on the minimum of $7 and maximum of $18. If the minimum can be increased the maximum can and should be increased for the same reason.

MAXIMUM RATE OF COMPENSATION.—Judicial notice taken of insurance premium being based on the minimum of $7 and maximum of $18. If the minimum can be increased the maximum can and should be increased for the same reason.

REVIEW.—Where Full Commission finds nothing justifies alteration or amendment of opinion of hearing Commissioner, such opinion will be adopted by the Full Commission. Hearing Commissioner's opinion and findings of fact adopted.

Hearing before the full Commission at Raleigh, N. C. in the Hearing Room of the Industrial Commission, October 18, 1929.

Opinion by DORSETT, Commissioner.

This was an appeal from an award by Matt H. Allen, Commissioner, rendered on October 4, 1929.

There was an agreement entered into between the parties on the 26th day of August, 1929, in which certain material facts relating to the employment, the average weekly wage, etc., are set out, and the facts so agreed upon are hereby adopted as findings of facts by the Commission.

After the award was made the Industrial Commission received notice of a change in condition in that the four fingers referred to in the agreement had been amputated and the Commission thereupon on its own motion, and in pursuance of Section 46 of the Compensation Act, assigned the claim for hearing and review on October 1, 1929, after first giving due notice to all parties in interest.

Upon the review before Matt H. Allen, Commissioner, Dr. R. D. Pearson testified that the four fingers of the right hand had been removed and that the claimant, in addition, had sustained a "crushed, burning wound over the posterior part of the hand."

From the evidence offered at the hearing and review by Matt H. Allen, Commissioner, Dr. Pearson testified that she had lost four-fifths of the use of the hand, whereupon the Commissioner increased the award from one hundred weeks to one hundred twenty weeks in pursuance of the provisions of sub-section "t" of Section 31.

The appellant insisted that there was an error in applying sub-section "t" of Section 31 and takes the position that only the fingers, and not the hand, is involved. This position might be well taken but for the testimony of the Doctor, that in addition to the loss of the fingers the claimant had sustained a "crushed, burning wound over the posterior part of the hand." Upon this evidence the Commission finds that in addition to the loss of the fingers the hand was crushed and that, therefore, the application of the provisions of sub-section "t" of Section 31 was proper and that the increase in the award from one hundred to one hundred twenty weeks be and the same is hereby in all respects affirmed.

The appellant raises the further question that the award should be reduced from seven ($7) dollars per week to three ($3.60) dollars sixty cents per week for the reason that the average weekly wage of the claimant was only three ($3.60) dollars sixty cents.

The Legislature has fixed a minimum of seven ($7) dollars per week and a maximum of eighteen ($18) dollars per week and there is no provision in our Act that where the wages of the claimant are below the minimum the wages shall govern, nor is there any provision that the maximum may be exceeded in any case.

The Commission must take judicial notice that the insurance premiums are based upon a minimum of seven ($7) dollars per week and a maximum of eighteen ($18) dollars per week, and if the minimum of seven ($7) dollars can be reduced in a particular case because the wages of the claimant happen to be less than the minimum, the maximum of eighteen ($18) dollars per week can and should, for the same reason be increased in another case because sixty per cent of the average weekly wages of the claimant exceeded the maximum of eighteen ($18) dollars per week.

The Commission finds that the award of seven ($7) dollars per week for one hundred twenty weeks is a proper award upon the record as presented and the judgment, award and opinion of Matt H. Allen, Commissioner, are hereby adopted as the judgment, award and opinion of the Full Commission.

Where the full Commission can find nothing to justify an alteration or amendment in the opinion of the hearing Commissioner, the full Commission will adopt the opinion as that of the full Commission.

[Docket No. 33]

DEWEY DANIELS, Employee, Deceased: NANNIE DANIELS, PANSY DANIELS, EMMA JEAN DANIELS and ALFRED DANIELS, Plaintiffs, v. ASHEVILLE PAVING COMPANY and MARYLAND CASUALTY COMPANY, Defendants

Filed October 21, 1929

FATAL CASES.—Total dependents allowed compensation on basis of 60 per cent average weekly wages for period of 350 weeks, plus burial expenses of $200 and medical and hospital fees.

RECEIPTS FOR PAYMENT.—Receipt from natural guardian acquits and discharges defendants of all claims and demands of minor children.

Hearing before MATT H. ALLEN, Chairman, at Asheville, Buncombe County, N. C., October 16, 1929, at 10 a.m.

Plaintiffs appeared in person.

Defendants represented by *Mr. M. L. Page*, of the Maryland Casualty Company, Asheville, N. C.

Opinion by ALLEN, Chairman.

It was admitted in open court by the plaintiffs and defendants that the deceased was regularly employed by the Asheville Paving Company at the time of his death, and that the accident arose out of and in the course of his employment; leaving for determination two questions, to wit:

1. What was the average weekly wage of the deceased?
2. Who were his dependants, if any?

Upon the first question it appears from the evidence that for five months previous to the death of the deceased he worked ninety-six days and earned three hundred fifty-seven ($357.50) dollars fifty cents, and that during the time in which the plaintiff was not engaged in work for the defendant he received from other employers twenty-one ($21) dollars per week; that claimant worked for the defendant regularly while the defendant company was engaged in active work, and that during part of the time the claimant would work as many as twelve hours per day at the rate of thirty-five (35c) cents per hour; that the claimant was a sober and hard-working man and willing to work, and a young man who could and did hold a job.

Upon all of the evidence the court finds as a fact that the average weekly wage of the claimant was twenty-two ($22.32) dollars thirty-two cents per week.

Upon the second question it appears from the uncontradicted evidence that Nannie Daniels, Mother, Pansy Daniels, sister, eighteen years of age, Emma Jean Daniels, sister, twenty years of age, and Alfred Daniels, brother, sixteen years of age, were totally dependent upon the claimant; and the Commissioner finds as a fact that the above named parties were totally dependent upon the claimant.

Upon the foregoing findings of fact and the admissions of the parties it is considered, ordered and adjudged that an award issue providing for the payment by the defendants to Nannie Daniels, Pansy Daniels, Emma Jean Daniels, and Alfred Daniels the sum of thirteen ($13.39) dollars thirty-nine cents per week for a period of three hundred fifty (350) weeks, and the sum of two hundred ($200) dollars for burial expenses, plus all medical and hospital fees, and that the defendants pay the cost of this hearing.

It is further ordered that the award shall provide that the receipt of Nannie Daniels, mother of the deceased and natural guardian of Pansy Daniels, Emma Jean Daniels and Alfred Daniels, shall acquit the defendants and fully and completely discharge the defendants of all claims or demands of said minor children. It is further ordered and adjudged that said minors upon reaching his, her or their majority may appeal to the North Carolina Industrial Commission for an amended award.

[Docket No. 39]

THOMAS POSTON, Employee, Plaintiff, v. AMERICAN ENKA CORPORATION, and THE TRAVELERS INSURANCE COMPANY, Defendants

Filed October 21, 1929

Facial and Head Disfigurement.—As was held in the case of *Henniger v. N. C. Industrial Commission,* to be compensable a disfigurement must be serious, not slight and trifling. Claim dismissed because disfigurement not serious.

Hearing before Matt H. Allen, Chairman, at Asheville, Buncombe County, N. C., October 16, 1929.

Plaintiff appeared in his own behalf.
Defendants represented by *Mr. Newson,* of Asheville, N. C.

Opinion by Allen, Chairman.

This was a claim from Buncombe County filed by plaintiff for compensation or damages for facial disfigurement. The defendants denied liability upon the ground that there was no serious or permanent disfigurement.

It was admitted that the plaintiff at the time of the accident was in the employ of the defendant and that any injury sustained by him arose out of and in the course of his employment; that his average weekly wage was twenty-four ($24) dollars per week. It was also admitted that claimant had been paid compensation for his disability and that he had returned to work, thus leaving the one question as to serious facial disfigurement at issue.

The plaintiff was present in person and presented the facial scars.

Dr. A. P. Willis testified that plaintiff sustained a small cut on the right wing of the nose and a small cut on the left cheek; that he took one stitch in each wound; that there was no adhesion with either wound; that the scar might be visible even after twelve months; that within twelve months the scar would not be seen upon a casual look; that he did not regard the scar as serious facial disfigurement; that the scar would be negligible in a few months.

Upon the foregoing testimony of Dr. A. P. Willis, and after viewing the scars of the claimant, the Commissioner is of the opinion and finds as a fact that plaintiff has sustained no serious facial disfigurement.

Sub-section "t" of Section 31 of the North Carolina Workmen's Compensation Act provides that "In case of serious facial or head disfigurement, the Industrial Commission shall award proper and equitable compensation not to exceed twenty-five hundred ($2,500) dollars.

It is evident that the Legislature did not intend that there should be a recovery in every case of disfigurement for the reason that practically every injury involves some slight scar or disfigurement.

This Commission has held in the case of Henninger v. North Carolina Industrial Commission that compensation will not be allowed unless it is established that the disfigurement is serious. Dorsett, Commissioner, in the Henninger case says "Serious means important, weighty, momentous and not trifling. Slight and trifling marks are not serious disfigurement."

To warrant compensation for disfigurement it must be so permanent and serious that it, in some manner, hampers or handicaps the person in his earning or in securing employment, or it must be such as to make the person repulsive to other people.

The question of facial disfigurement is fully discussed by Dorsett, Commissioner, in the case of *Henninger v. North Carolina Industrial Commission* and upon the authority of that decision the Commissioner concludes that the disfigurement of the claimant in this case is not serious and will not in any manner affect his ability to procure employment, and that his scars do not impair his personal appearance in any appreciable manner.

Upon the foregoing and for the reasons stated it is ordered and adjudged that an award be issued denying compensation or damages for the alleged facial disfigurement and that the plaintiff pay the cost of this hearing.

[Docket No. 31]

J. J. SIDES, Employee, Plaintiff, v. STANLY COUNTY ROAD BOARD, Employer and THE EMPLOYERS LIABILITY ASSURANCE CORPORATION, LTD. Defendants

Filed October 21, 1929

HERNIA.—Upon the findings that there was a preëxisting hernia, claim for benefits under Section 2 (r) denied.

Hearing before MATT H. ALLEN, Chairman, at Albemarle, Stanly County, N. C., October 17, 1929.

Plaintiff represented by *R. L. Brown*, Attorney, Albemarle, N. C.

Defendants represented by *A. B. Greher*, Adjuster for the defendant Insurance Company of Greensboro, N. C.

Opinion by Allen, Chairman.

This was a claim from Stanly County, for hernia, due to an accident which it was claimed arose out of and in the course of employment.

It was admitted that plaintiff was regularly employed by the defendant, Stanly County Road Board, and that the accident arose out of and in the course of employment and that the Employers Liability Assurance Corporation, Ltd. insured the liability of the Stanly County Road Board for any compensation that may be due.

It appears from the evidence that on July 30, 1929, the plaintiff was engaged in operating a road machine for Stanly County and that in the operation of said machine he was in some manner thrown across the nob on the steering wheel and it struck him in the stomach causing protrusion of the hernial sack and intestines; that during the latter part of September the plaintiff was operated upon for hernia and will be able to return to his work within a short time; that he received three ($3.50) dollars fifty cents per day when engaged in work for the county; that his work depended upon the weather and that at times he worked full time and at other times was laid off on account of bad weather.

The Plaintiff testified upon direct examination as follows:

Q. Had you suffered with hernia or rupture before this time?
A. Yes Sir.
Q. How long prior to this time?
A. Fifteen years.
Q. Had you been cured of that former rupture?
A. No Sir.
Q. Ever have an operation?
A. No Sir, never lost a days work on account of it.

Upon cross examination plaintiff testified as follows:

Q. Isn't that the place of the other rupture?
A. Yes Sir.
Q. The same place?
A. Yes Sir.

Upon consideration of all the evidence the Commissioner finds as a fact:

1. That the average weekly wage of the claimant is $21 per week.
2. That the hernia complained of was not the result of the accident, but existed prior to the accident for which compensation is claimed.

Upon the foregoing findings of facts it is ordered and adjudged that an award be issued denying compensation with the incident medical and hospital treatment.

It appears that claimant did not request a hearing in this case, but that the hearing was requested by the defendant and it is thereupon ordered that the award herein shall provide that the defendants be taxed with the cost of this hearing.

[Docket No. 27]

JUNE BRYANT, Employee, Plaintiff, v. J. J. McDEVITT COMPANY, Employer and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed October 21, 1929

Varicocele.—Varicocele is a gradual development and does not appear suddenly. Varicocele complained of not of recent orgin. Claim denied.

Attorneys.—Commission endeavors to treat counsel with all due consideration and will continue to do so. At the same time the Commission will require of parties and counsel the same consideration.

Hearing before Matt H. Allen, Chairman, at Charlotte, N. C., Mecklenburg County, October 15, 1929, at 11 a.m.

Neither plaintiff or his Attorney, *Samuel E. Vest*, Charlotte, N. C. appeared at this hearing.

Defendants represented by *Mr. C. W. Bundy* and *Mr. W. C. Ginter*, Attorneys, Charlotte, N. C.

Opinion by Allen, Chairman.

Statement of Case

It appears from the record in this case that on July 11, 1929, the claimant was injured while rolling a concrete cart from mixer to dumping place and slipped on a piece of gravel, causing contusions of left lower abdomen and left side of scrotum; that the average weekly wage was thirteen ($13.75) dollars seventy-five cents per week, that on July 23, 1929, the claimant and the defendants entered into an agreement for compensation, which agreement is hereby referred to and made a part hereof; that upon the filing of the said agreement with the Industrial Commission an award was issued allowing claimant compensation at the rate of eight ($8.25) dollars twenty-five cents per week beginning from July 13, 1929 and to continue during the period of disability; that on August 5, 1929, the physician's certificate of termination of disability was filed with the Commission, in which it was stated that the disability resulting from the injury had terminated and that claimant was able to return to work on the 27th day of July, 1929; that on August 13, 1929, the defendants made application to stop payment of compensation for the reason that the disability of the claimant had terminated, and that on August 17, 1929, authority to discontinue payments was granted by the Commission; that on September 25, 1929, a request for a hearing was made by the claimant through his Attorney, Samuel E. Vest; that on September 25, 1929 notice of hearing was given to all parties in interest, by registered mail, advising that a hearing would be held in the office of the Clerk of Superior Court of Mecklenburg County at Charlotte, N. C. at 10 o'clock, a.m. October 15, 1929; that on September 27, 1929, said notice of hearing was delivered to Samuel E. Vest, Attorney, and his receipt taken therefore that on October 15, 1929, Matt H. Allen, Commissioner, appeared at the office of the Clerk of Superior Court of Mecklenburg County at 10 o'clock a.m. and found the defendants, J. J. McDevitt Company and Maryland Casualty Company, present through their representatives C. W. Bundy and W. C. Ginter with witnesses Dr. E. R. Hipp and Dr. W. W. Baxley; that several unsuccessful efforts were made to communicate with Mr. Samuel E. Vest by telephone, and finally a messenger was sent to his office with the result that he could not be located; that the Commissioner waited for one hour before proceeding with the hearing of the testimony; that neither Samuel E. Vest, Attorney, nor the plaintiff made any appearance or any request for a continuance of the hearing, and left no message with any person for the Commissioner; that at 11 o'clock a.m. the Commissioner announced that he would hear the evidence of the defendants, whereupon Dr. E. R. Hipp and Dr. W. W. Baxley were examined under oath.

It appears from the evidence that on July 11, 1929, this plaintiff was injured by bruises of the left lower abdomen and the left side of scrotum, and that he was treated by Dr. E. R. Hipp of Charlotte, N. C.; that at the time of the physician's certificate of termination of disability the claimant had a large varicocele on the left side, and it is contended by the claimant that the varicocele from which he now suffers is due entirely to the injury sustained on July 11, 1929.

Dr. E. R. Hipp testified that varicocele is of gradual development and that it does not develop suddenly; that in his opinion the varicocele complained of by the claimant was present previous to the injury; that in his opinion it would be impossible for a well developed varicocele, such as he found upon examination of this claimant, to have developed the next day after the accident; that sixty-five (65%) per cent of normal adults have varicocele of varying degree of severity; that the varicocele complained of by the plaintiff appeared not to be of recent origin.

Dr. W. W. Baxley gave as his opinion that varicocele could not develop suddenly, and that in his opinion the varicocele complained of by the plaintiff was not of recent origin.

Upon consideration of all the evidence the Commissioner finds as a fact:

1. That the varicocele from which the claimant is now suffering was not the result of the injury sustained on July 11.
2. That claimants disability has terminated and that he was able to return to work on the 27th day of July, 1929.
3. That claimant has been paid one week's compensation and is entitled to receive additional compensation for two-sevenths of one week at the rate of eight ($8.25) dollars twenty-five cents per week or two ($2.36) dollars thirty-six cents.

Whereupon it is ordered and adjudged that an award issue providing for the payment to the claimant of two ($2.36) dollars thirty-six cents. It is further ordered and adjudged that the plaintiff pay the cost of this hearing.

The Commissioner is unable to understand the apparent discourtesy on the part of the counsel for claimant. The hearing was requested at the instance of counsel and the Commission sent its representative from Raleigh to Charlotte to conduct the hearing, and without any reason or excuse both counsel and claimant absented themselves and left no message as to their whereabouts or request for continuance of the hearing and made no excuse for their absence. The Commission has endeavored to treat counsel and parties with all due consideration and respect and it will continue to do so, but at the same time it will require of parties and counsel the same respectful consideration.

In the present case the State of North Carolina has been put to the expense of approximately fifty ($50) dollars, exclusive of salaries, in sending two salaried employees from Raleigh to Charlotte to hear the complaining party whose attorney had requested, in writing, an opportunity to be heard.

[Docket No. 25]

CLAUDE WATSON, Employee, Plaintiff, v. CANNON MILLS COMPANY, Employer, Self-Insurer, Defendant

Filed October 21, 1929

Facial Disfigurement.—Facial disfigurement as held in case of *Henninger v. N. C. Industrial Commission* is not a disability as that term is generally used unless it interferes with the workman's reëmployment. Disfigurement to be compensable must be serious—not trifling. Claim denied.

Mental and Physical Suffering.—Excruciating pain and mental suffering not compensable.

Hearing before Matt H. Allen, Chairman, at Concord, N. C., October 2, 1929.

Mr. J. M. Waggoner represented the claimant plaintiff.
Mr. H. W. Beckerdite represented the Cannon Mills Company, Defendant.

Opinion by Allen, Chairman.

This was a claim from Cabarrus County for serious bodily disfigurement.

Upon calling of this case for hearing and upon motion of counsel for plaintiff it was agreed that the claim should include facial disfigurement.

It was admitted that the plaintiff was regularly employed by the defendant and that the accident arose out of and in the course of his employment, and that the average weekly wage of the claimant was thirteen ($13.20) dollars twenty cents per week. It was further admitted that the disability of claimant terminated on August 19, 1929, and that compensation had been paid him amounting to forty-seven ($47.52) dollars fifty-two cents. It was contended by the plaintiff that he was entitled to one week's additional compensation, but he testified that he did agree to go to work one week before he actually resumed his duties. From the foregoing admissions and agreements the commissioner finds that temporary total disability ended on August 19 and there is no further sum due on account of disability.

Upon the question of compensation for facial and or bodily disfigurement, it appears from the evidence that claimant has a slight permanent discoloration of the right hand; slight permanent scar behind the right ear; that all of the scars except the slight discoloration on the back of the hand and the scar behind the ear will disappear in time; that the scars are only slightly noticeable now and that both the scar and discoloration will lessen in time. It further appears that the rim or outside portion of the ear is thinner, making the ear somewhat smaller in circumference.

The medical testimony was all to the affect that all of the scars, other than the injury to the ear, would ultimately assume normal proportions except that there would be a slick surface of the skin behind the ear and on the hand. It also appeared from the medical testimony that the difference between the right ear and the left ear was very slight and would not be detected except by close examination.

Upon consideration of all of the evidence and after personally examining the plaintiff's scars the Commissioner is of the opinion and finds as a fact that there are no serious facial or head disfigurements.

Sub-section "t" of Section 31 of the Workmen's Compensation Act provides that "In case of serious facial or head disfigurement, the Industrial Commission shall award proper and equitable compensation not to exceed twenty-five hundred ($2,500) dollars."

There is no doubt but that plaintiff's injury will leave some slight scar or disfigurement, but in order to justify compensation the disfigurement must be serious, and serious means important, weighty, momentous and not trifling. Scars or marks of some kind almost universally follows every injury involving the burning or laceration of the skin, and some degree of disfigurement results therefrom. It is plain that disfigurement alone is not the basis of compensation because the legislature evidently intended that some meaning should be given to the word "serious."

Dorsett, Commissioner, in the case of *Henninger v. North Carolina Industrial Commission*, quotes with approval from Harper on "Workmen's Compensation," Section 142, as follows: "Disfigurement is not a disability as that term is generally used unless it prevents or interferes with the workmen's reëmployment." In the present case the Commissioner cannot find that the scars of this plaintiff will in any manner prevent or interfer with his reemployment, and it certainly cannot be found from the evidence in this case that his scars are such as to make him more or less repulsive to the people with whom he associates.

Upon hearing of this case counsel for plaintiff insisted that the claimant was entitled to damages for physical and mental suffering and urged the commissioner to permit evidence upon this question. The Commissioner was of the opinion physical and mental suffering were not compensable and so stated in open court, but in order that counsel might have the question presented to the Supreme Court the Commissioner permitted evidence upon this question.

Upon the evidence offered by the plaintiff as to mental and physical suffering of the claimant the Commissioner finds as a fact that the claimant suffered excruciating pain for many days after the accident.

Upon consideration of all of the evidence it is ordered and adjudged that an award issue denying compensation to plaintiff and providing the cost of this hearing be taxed against the plaintiff.

[Docket No. 30]

W. L. FOWLER, Employee, Plaintiff, v. PROGRESSIVE PAINTING & DECORATING COMPANY, Employer, and STANDARD ACCIDENT INSURANCE COMPANY, Carrier, Defendants

Filed October 28, 1929

Medical, Hospital Services.—Upon findings that employer not offered medical treatment cannot be said that injured refused medical treatment.

Hearing before J. Dewey Dorsett, Commissioner, at Winston-Salem, N. C. on October 16, 1929.

Plaintiff appeared in person.

Defendant employer not represented at this hearing.

Defendant insurance carrier represented by *Mr. O. L. Sapp, Jr.*, Adjuster, for the Standard Accident Insurance Company.

Opinion by Dorsett, Commissioner.

Statement of Case

The plaintiff in this case was a painter by trade and was working for the Progressive Painting and Decorating Company. He is claiming compensation for an injury by accident by falling off of a step ladder while working for the obove named employer. The accident report shows that the plaintiff was injured on August 1 while descending a six foot ladder. The said employee suffered a bruised right side, shoulder, elbow and hip.

Hearing in this matter was requested by the carrier on the grounds that the injured failed to demand or accept medical treatment thereby prejudicing his condition for a period of approximately thirty days, and that he is malingering or suffering from a condition not caused by the accident. The plaintiff and a fellow employee by the name of Owens and Dr. R. A. Moore testified in this case. On all of the testimony in the case the Commission makes the following:

Findings of Fact

1. That the parties, plaintiff and defendant, are bound by the provisions of the North Carolina Workmen's Compensation Act of 1929, none of the parties having served notice on the other of having rejected the said Act.

2. W. L. Fowler, employed at the time as a painter, testified that his average weekly wage at the time of his injury was $24.75 a week. The accident resulting in the injury arose out of and in the course of his employment and the insurance carrier intervening as a party defendant is liable for any compensation due and medical and hospital bills in the instant case.

3. It is in the record, and it is so found, that the plaintiff returned to work the next day after the accidental injury and worked one week, when he was discharged on the supposed ground that there was no further work for him to do. He is, therefore, not entitled to any compensation for the

week he worked after returning to work after the injury because he made full wages that week.

4. The plaintiff is entitled to compensation as provided in the Act until total disability terminates, payments to begin on August 11, 1929 and to continue at the rate of $14.85 per week not to exceed four hundred weeks as provided in the law or until total disability terminates.

5. There is no evidence to substantiate the point raised by the insurance Carrier with reference to his cause being prejudiced because no medical treatment was had for some several days. There is no evidence that this plaintiff was ever offered any medical treatment by his employer and he, therefore, didn't refuse any medical treatment.

Conclusions of Law

In considering the application of the law to the foregoing facts it is pertinent to note that Section 25 of the Act sets out that the employer must furnish medical attention, hospital and other treatment to an injured employee for the first ten weeks and for such additional time as will, in the judgment of the Commission, tend to lessen the time of compensation disability.

It is our conclusion under the evidence presented that the plaintiff, W. L. Fowler, is entitled to compensation. We, therefore, make the following award:

Award

The insurance carrier is hereby ordered to pay to W. L. Fowler at the rate of sixty per cent of his average weekly wages from August 11, 1929 for a period not exceeding four hundred weeks, or until total disability terminates. It is further ordered that the defendant pay all of the medical and hospital costs and the cost of this hearing.

[Docket No. 28]

HARVIE N. MORGAN, Plaintiff, v. TOWN OF SMITHFIELD, Employer, and AETNA LIFE INSURANCE COMPANY, Defendants

Filed October 31, 1929

FACIAL AND HEAD DISFIGUREMENT.—For serious facial and head disfigurement both repulsive to the eye and making employment more difficult, compensation award of $750.

Hearing before T. A. WILSON, Commississioner, at Smithfield, on October 14, 1929, but hearing was postponed and reset for hearing on October 21, 1929, at 10 a.m.

Plaintiff appeared in person.

Defendants represented by *Mr. J. N. Smith*, agent for *Mr. Kennety Royall*, Attorney for the Aetna Life Insurance Company, of Goldsboro, N. C.

Opinion by WILSON, Commissioner.

All other facts being admitted, the above styled case was heard to ascertain the extent of serious facial disfigurement sustained by plaintiff.

Upon the evidence in this case, the Commission makes the following

Findings of Fact

1. That plaintiff, Harvie N. Morgan, was injured by accident arising out of and in the course of his employment on August 17, 1929, while employed by the Town of Smithfield; said town having its compensation liability carried by the Aetna Life Insurance Company; said plaintiff was hit in the head with a shovel.
2. That all compensation for total disability has been paid by said carrier, and all medical bills incurred from said accident have been paid by said insurance company.
3. That plaintiff sustained a serious and permanent facial and head disfigurement to his forehead as a result of said accident; that said disfigurement was in the form of an inverted letter "Y" in the center of plaintiff's forehead; said injury caused an indentation of the skull, and the scar is fastened to the tissues of his skull; that said disfigurement is both repulsive to the eye and, in the opinion of the Commission, makes the employment of plaintiff more difficult in the open labor market; that because of the size and position of disfigurement plaintiff's face is disfigured approximately one-third, using the forehead as one-third, and the cheeks one-third each.
4. That plaintiff is forty-five years old; his average weekly wage is $46.17.

Conclusions of Law

1. That plaintiff is entitled to $750 for serious facial and head disfigurement under paragraph two, sub-section (t) of Section 31.

Award

1. That plaintiff is awarded $750, payable every four weeks, at the rate of $18 per week.

[Docket No. 29]

WADE H. DURHAM, Employee, Plaintiff, v. STATE HIGHWAY COMMISSION, Employer, Defendant, Self-Insurer

Filed October 31, 1929

HEAD AND BODILY DISFIGUREMENT.—For serious head disfigurement $250 award; serious bodily disfigurement $750 award. Not the Legislative intent to allow compensation for usual ordinary disfigurement resulting from healing of cut or laceration. Disfigurement must be serious.

Hearing before J. DEWEY DORSETT, Commissioner, at Raleigh, N. C. October 1, 1929.

Plaintiff represented by *Mr. L. P. Dixon*, Attorney, Siler City, N. C.
Defendant represented by *Mr. H. K. Witherspoon.*

Opinion by DORSETT, Commissioner.

Statement of Case

This employee, Wade H. Durham, was injured on July 31, 1929, by being severely burned in an explosion. The explosion was caused by pouring gasoline in the tank in a machine used by the State Highway Commission while the motor of this machine was running.

The plaintiff was regularly employed by the State Highway Commission and under the immediate supervision of one W. E. Moore, a field supervisor for the State Highway Commission. The Highway Commission is not denying liability in this case and an award has been made and the Department is now paying compensation at the rate of $9.90 per week during total disability subject to the provisions of the North Carolina Workmen's Compensation Act.

The defendant, immediately after the accident, sent the plaintiff to the Pittman Hospital in Fayetteville and is now providing hospital and medical care as provided by the Act. There is no dispute as to there being an injury by accident arising out of and in the course of the plaintiff's employment, or about the average weekly wage being $16.50 per week.

This hearing was requested by the plaintiff to establish what amount of money, if any, he is entitled to for serious facial, head and bodily disfigurement, and to also find out if he is entitled to anything for the loss of use of left arm and hand, and for loss of hearing in left ear. The Commission had the opportunity of observing the employee as well as the benefit of testimony of two medical doctors and a full report of an examination made on October 29 by Dr. R. L. Pittman who is attending the plaintiff in the Pittman Hospital at Fayetteville. We also have before us a brief prepared by the able counsel for the plaintiff setting forth the contentions of his client.

From all of the evidence presented and from the reports of Dr. R. L. Pittman the Commission makes the following:

Findings of Fact

1. That Wade H. Durham, an employee of the North Carolina State Highway Commission, was injured while regularly employed by the Commission. Said accident occurred about 3:45 o'clock p.m., July 31, 1929, near Garland, North Carolina. The accident was caused by ignition of gasoline while filling the tank of a road machine with the motor running, resulting in severe burns.

2. That both defendant and plaintiff are bound by the provisions of the North Carolina Workmen's Compensation Act.

3. The plaintiff has been totally disabled from date of accident.

4. The plaintiff has burns on the face that are superficial and will leave no permanent scar, and the superficial redness now existing will be less pronounced with time. At this time there is a slight redness of skin over the left temple and over the left ear but this will disappear entirely. There is a

slight scar on the chest from superficial burns and on the left hand and arm from shoulder to elbow, this plaintiff has second degree burns that will cause permanent scars but no disability. Back of the left elbow, forearm and hand the plaintiff has third degree burns that will cause permanent scars and slight loss of power in the elbow, wrist and hand. Permanent disability of these parts will be determined when the plaintiff is able to go to work. The plaintiff has burns on the legs that are second degree burns and will cause permanent scars but no disability.

5. The plaintiff sustained burns in the ear which in all probability will leave a scar, but this Commission cannot find that his hearing has been impaired.

6. From the medical testimony we find that the burned areas are sensitive to extreme cold and that this plaintiff cannot resume outside work for three or four months.

7. The plaintiff's average weekly wage is $16.50 per week.

Conclusions of Law

Compensation for temporary total disability is now being paid by the defendant at the rate of $9.90 per week. Hospital and medical treatment is being furnished as is required by the Act.

The question of permanent loss of use of any member is being held over until the plaintiff is able to return to work. The question presented now is whether the scars caused by the injury constitute serious disfigurement.

When the disfigurement section of our law is carefully analyzed it appears that it is not the intention of the legislature to compensate for all disfigurement resulting from an injury. It is plain that disfigurement alone is not the basis of compensation because the use of the word "serious" indicates that it is not the intention of the legislature to allow compensation for the usual and ordinary disfigurement resulting from the healing of a cut or laceration. The laws of several states require that disfigurement be serious and that disfigurement must also effect the employability of the employee. It is not enough that he may have disfigurement but it must be a serious disfigurement.

When we consider the evidence in this case in the light of what we conceive to be the spirit and intent of the provisions of the law we feel satisfied that the scars resulting from the injury to this employee are serious within the meaning of our law. The character of work which the person in question or is capable of doing should be an important factor in determining the question of serious disfigurement. For instance, a particular disfigurement might not effect the employability of a laundress while the same disfigurement would be serious to a young man in a different social status, or a young man, for instance, who contemplates the practice of law. In the instant case the plaintiff has been a student at one of our universities and is preparing himself to practice law. In the present case the plaintiff is a young man in his early twenties and in our mind will carry serious disfigurement throughout his life, and we believe the plaintiff is entitled to $250 for this serious head and $750 for the serious bodily disfigurement as provided for in the second and third paragraphs of sub-section "t" of Section 31 on the North Carolina Workmen's Compensation Act. The plaintiff is further entitled to full medical, surgical and hospital treatment as provided for in Section 25 of the said Act.

Award

The award heretofore referred to with reference to the payment of $9.90 per week subject to the provisions of the law for temporary total disability is incorporated in this award and the defendant will continue to pay $9.90 per week, not to exceed four hundred weeks, during the period of temporary total disability.

2. The defendant will pay to the plaintiff the sum of $250 compensation for serious head and $750 for serious bodily disfigurement. The total $1,000 to be paid at once in a lump sum.
3. The defendant will pay to the proper parties the reasonable cost of all necessary medical, surgical and hospital services heretofore rendered and which may hereafter be necessary as a result of this injury of the plaintiff.
4. Each side will pay its own cost and the cost of this hearing shall be equally divided between the parties to this case.

A bill in the sum of $25 rendered by Dr. W. Clyde Thomas is approved and the plaintiff is ordered to pay this sum at once. Dr. Thomas was summonsed as a witness for the plaintiff.

The Commission is called upon to fix the fee for Attorney L. P. Dixon and a fee of $50 is hereby approved, and the plaintiff will pay this amount to its attorney.

[Docket No. 24]

J. P. SOUTHERN, Deceased, Employee, et al. Plaintiffs, v. MOREHEAD COTTON MILLS COMPANY, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed October 30, 1929

Arising Out of and in the Course of Employment.—"Out of" points to the origin or cause of the injury, "in the course of" to the place and circumstance of injury. Injury may occur in course of employment and not arise out of. Night watchman drowned on duty. Drowning resulting from act performed during excitement, presumed for purpose of preserving master's property, altho' bad judgment used, arises out of employment.

Negligence.—Negligence of employee not sufficient grounds for denying compensation.

Rescue.—Where rescue is shown to be in the furtherance of the master's service the resulting accident arises out of employment.

Hearing before J. Dewey Dorsett, Commissioner, at Wentworth, N. C. September 28, 1929.

Plaintiffs represented by *Mr. B. W. Walker*, Attorney.

Defendant insurance company represented by *W. C. Ginter*, Insurance Adjuster of the Maryland Casualty Company, of Charlotte, N. C.

Opinion by Dorsett, Commissioner.

Statement of Case

The plaintiffs in the present case are the widow and children of one J. P. Southern. J. P. Southern was, at the time of his death, employed by the defendant company as a night watchman on the night of September 6, 1929, at a wage of $22.64 per week. Mrs. J. P. Southern and the following minors and unmarried children are the admitted dependents: Stanford Southern, age fifteen; Elaine Southern, age twelve; and Talmadge Southern, age nine.

On the 6th of September, 1929, at about 8:10 o'clock p.m., Southern was drowned in a canal at Spray, Rockingham County, North Carolina. Mr. Southern was a regular employee of the Morehead Cotton Mills Company of Spray, North Carolina. The Morehead Cotton Mills Company has complied with the North Carolina Workmen's Compensation Act by insuring its liability for compensation specified in the said Act with the Maryland Casualty Company, who is an intervening party to this case.

The deceased was employed by the defendant company as a night watchman and had been in the said company's employ for about eighteen years, and had been this Company's night watchman for about nine years. On the night of September 6, and at the time this deceased night watchman was making his regular "rounds" and "punching" a clock provided by his employer it appears that the deceased, while in the performance of these duties, saw a car that was going along the highway on the other side of his employer's canal drive into the said canal. This canal or pond is the source of the water supply used in the regular business of the employer, and a part of the premises of the employer. It is in evidence that after the deceased saw the car run into the canal that he went into the "shop" and told the night foreman what had happened and spoke of getting someone to help raise the gates "to release the stored waters," that there was a car load of people in the canal and they "would have to stop the mill and let the water out and get the people out."

It is in evidence that the deceased raised the gates and then continued to make his "rounds." The evidence shows that he made his eight o'clock "rounds" after the car went into the canal, and the evidence further showed that not a round had been missed. After the deceased told the night foreman what had happened and had raised the gates and finished his round the next thing we hear about the deceased is from one W. A. Royster, who is the son of the Superintendent of the Mill and a fellow employee working at night, who says that he saw the deceased climb down a ladder on the wall of the canal and heard him call to the other side inquiring if they needed any help, and then saw him jump into the water and start swimming across the canal, that the current caught him when he was about half way across finally carrying him through the gate and to his death.

The defendants contend that the accident does not come within the provisions of the North Carolina Workmen's Compensation Act and in their brief they contend that only two questions are involved; namely, (1) that the accident did not arise out of the employment of J. P. Southern, the deceased. (2), that the accident did not occur in the course of the employment of J. P. Southern, the deceased.

The Commission agrees, since certain admissions have been made and are a part of the record, that we are concerned with only two questions in the instant case; (1), did the accident causing the death of the deceased arise in the course of his employment; and (2), did the accident causing his death arise out of his employment.

On all the testimony in this case the Commission makes the following

Findings of Fact

That no notice was served by the deceased employee upon his employer, nor by his employer upon him, rejecting the North Carolina Workmen's Compensation Act of 1929, hence both are bound by the provisions of the said Act.

2. The defendant employer complied with the provisions of the Act with reference to insuring his liability to pay compensation, and insured the same in the Maryland Casualty Company, one of the parties to this case.

3. It is admitted and is a part of this record, and is now found as a fact that the deceased met his death by accidental drowning while regularly employed by the defendant employer, that his average weekly wage amounted to $22.64 per week, that his wife, Mrs. J. P. Southern, and minor children, Stanford, Elaine and Talmadge Southern, were at the time of J. P. Southern's death and for the three months prior thereto wholly dependent for support upon the deceased.

4. The owner of the mill has this to say: "His duties (referring to the deceased) consisted principally of making the rounds, but his duties also consisted of helping raise and lower the gates to the dam, look after the property around there and the tail race."

Mr. Royster, the superintendent of the defendant employer, has this to say: "He made the rounds, punched the clock and fired; we were carrying a light fire that night. He looked out for the property all around, and in case anything got in the rack it was his duty to get it out, or to get someone else to help him get it out, and he had charge of the pour, together with the gates and racks and anything around there. If the water got too high and he couldn't raise the gates he would go in the mill and get people to help him or see the night foreman."

Q. Where were you at the time this accident occurred?

A. I was at supper. My son called me and said the overseer had asked him to call me; that an automobile had run in the pond and that they would have to drain it to get it out, and that we would have to shut down the mill for three nights after that. I jumped in my car and rushed over to the mill."

The Superintendent testified that he thought the deceased was under the impression that the car was full of folks, and further that he did not know that anyone had ordered the deceased to jump into the canal for the purpose of rescuing the folks in the car.

Mr. Royster, the Superintendent, was asked this question:

Q. Would you consider his going into the pond to rescue this man in his line of duty?

A. The only way I could consider it in that light was that he knew that if something weren't done—if he didn't get the car out it would interfere with the running of the mill; that if the water all run out they would have to shut down the mill; I don't know whether he knew we could run without that water, but such was the case. If he didn't, he would do all he could to help the mill folks get started up. He met Mr. Mizelle and told him that the water would have to be drained off, and the only way to do it was by raising the gates and that's what he did. He had all the water cut out. Then they could get the car out before the water was put in again. Mr. Southern was a man that would do anything to keep his job going, and maybe he construed it to be in his line of duty to help get the car out and get the people out. He wanted to keep from having to drain it next day, and get it out so the mill could start up work. He might have construed it in that way.

The Superintendent further testified that it was a part of the deceased's duties to keep the pond clean, and was asked this question:

Q. As a matter of fact, if he had been assisting in getting the automobile out so the gates could be lowered he would have been assisting the company in keeping the water up so the boilers wouldn't run low?

A. Yes, Sir.

Q. The quicker the automobile was gotten out the quicker the gates could be lowered, and it was to the company's interest if he did this so the boilers would not have gotten too low?

A. Yes, Sir.

Mr. Royster was asked another question:

Q. If he jumped in, Mr. Royster, in your opinion wasn't it in the discharge of his duties in looking after the company's property, and wasn't he right there at that particular time to see about the water. Didn't he go in there to get the automobile out to enable you to fill the boiler more quickly so the mill could continue running?

A. Yes, Sir, he could have been of assistance, of course, and the gates could not be dropped until the automobile was gotten out. I think he was aiming to go over there and help until they found the body and got the automobile out.

Counsel for the defendants asked this question:

Q. In your opinion was his primary purpose to save the man or to disregard the man and try to keep the mill going?

A. Well, knowing the man as I did—he had a rather nervous disposition, and I think Mr. Southern was highly excitable—he was always a man that was fond of working and he always wanted to help somebody, and he would go through the mill and see somebody that needed a lift and would help him; he was always a man to give somebody a lift, and I think his whole-sole purpose was to get to the car, and get the car out, and help rescue somebody or ascertain if he could lower the gates.

Q. His main purpose was to save a life?

A. That's my honest opinion as to why he did that.

Q. Would the car in the canal have interfered with the operation of the mill?

A. Well, no, provided we didn't let the water out.

Q. You were anxious that the car be gotten out?

A. I stayed until midnight to do it.

Q. Would you have directed your men to get the car out had you been there?

A. Yes, Sir, I would have proceeded to have gotten it out as quick as I could so we could let the gates down.

The superintendent was asked this question:

Q. Was it in the line of his duty as a night watchman; that is, do you consider it a part of his duty to superintend and help get the car out of the canal?

A. If there was any trouble, or anything happened down there, he went to the night overseer if it was anything he couldn't handle. I suppose he was under the impression that they could hold him responsible for the water.

Q. As Superintendent you were interested in the removal of the car and the parties in the car?

A. Yes, Sir.

Q. Did any of your other employees go into the water to get the car out, that you know of?

A. No, Sir, we got a garage man to get it out.

In view of the foregoing we make the further finding of fact that J. P. Southern met with an accident arising out of and in the course of his employment upon the premises of his employer which resulted in his death.

Conclusions of Law

To warrant recovery of compensation under our law for the injury or death of a workman the injury must be one by accident arising out of and in the course of his employment (Section 2-F).

As has already been said, the present case presents only two questions; namely, (1), did the accident arise out of; and (2), in the course of the deceased's employment. The words "out of" point to the origin or cause of the injury. The words "in the course of" to the place and circumstance under which the accident or injury takes place. The former words are descriptive of the character or quality of the accident, the latter words relate to the circumstance under which the accident of that character or quality takes place. The character or quality of that accident as conveyed by the words "out of" involves the idea that the accident is in some sense due to the employment and must result from a risk reasonably incident to the employment (Honnold on Workmen's Compensation).

"It has been repeatedly observed that if an accident arises out of the employment it ordinarily arises in the course of it, but the converse is not true; an injury may occur in the course of employment and yet not arise out of it." Arising "out of" does not mean the same as "in the course of" but the expression in the Act implies a different construction. The words "in the course of employment" relates to the time, place, and circumstances under which the accident took place. An accident arising "in the course of employment" when it occurs within the period of employment at a place where the employee may reasonably be in the performance of his duties, and while he is fulfilling these duties or doing something incident thereto. The words "arising out of the employment" refers to the casual connections between the employment and the injury. (*New Amsterdam v. Summerall* (Ga.), 118 S. E. 786.)

That the deceased employee met his death by accidental drowning during the course of his employment cannot seriously be questioned. The question that is more perplexing in determination is: Was his death the result of an accident that arose out of the employment?

The deceased was a night watchman—the title of his occupation implies many duties devolving upon one engaged in such an occupation. It can be fairly inferred upon common knowledge of such an occupation that the watchman is primarily charged with the duties of preserving the employer's property, defending it with every means in his possession, and even risking his life if the need should arise to prevent depredation and loss thereof. Usually, the watchman, as was the fact in this case, was the sole custodian of the master's property during the vigil he maintains making his rounds of inspection in the dark night.

A suggestion is offered by the defendants that the deceased abandoned his employment, went beyond the scope of it by jumping into the canal, and the defendants contend that the uppermost thought in the mind of the deceased was to rescue those in the car that he knew was in the canal of his master. There is no evidence in the present case to sustain the contention that the deceased abandoned or went beyond his employment and that the sole purpose was that of rescuing somebody when he jumped into the canal. In fact, all of the evidence would indicate that the deceased in this instance had not abandoned his employment or gone beyond the scope of it. In considering the application of the law to the foregoing facts the most pertinent ruling is found in the cases of *Moneghan v. Montgomery*, 272 pa., 56, *Malky v. Kiskeminetas Valley Coal Company*, and *Berlin v. Crawford*, 11 Dept. Reps., 1188, which is as follows: "The provision is broad enough to include every injury received on the premises of the employer, during the hours of employment, so long as the nature of the employment demands the employee's presence there, regardless of whether his presence at the particular place where the injury occurred is actually required, if there is nothing to prove a virtual abandonment of the course of his employment by the injured person, or that at the time of the accident he was engaged in something wholly foreign thereto."

There is not sufficient evidence to prove that the deceased had gone beyond the scope of his employment and was engaged in something wholly foreign to his employment. On the other hand all of the circumstances and the evidence point to the fact that the deceased did not act like a man would have acted who had nothing in his mind except playing the hero in rescuing the drowning. Several minutes lapsed between the time the deceased knew about the car in the canal and the time he jumped into the canal to swim across. The evidence must lead one to the conclusion that the deceased knew that several folks had gathered around the scene of the car in the canal and that the occupants of the car had been saved or certainly would have by that time been drowned. All of the circumstances point to the theory of the plaintiffs that the deceased started across to the car to aid, supervise and assist in getting the car out of the canal with a view to serving his master in conserving the water supply and see that all was well on his master's premises, and in doing this he was engaged in doing what was reasonably incident to his employment, and was within the scope of his employment for the purpose of preserving his master's property.

What fairer inference could be drawn than that the deceased was at the time excited, and in his excitement still mindful of the interest of his employer probably used bad judgment and such as would not have been dictated in cooler moments, but nevertheless his actions during the short time preceding his death show every indication of serving the interest of his employer and carrying out his conception of his duties as night watchman and custodian of the property.

The Compensation Act does not penalize an employee for using bad judgment in the performance of his duties or acting heedless of danger to his own person in an emergency while preserving his master's property, nor is compensation denied because of an employee's negligence.

The deceased had no personal interest to serve and there is no evidence that he was doing other than the duties he was due his employer at the time of the accidental drowning. It must have been within the reasonable anticipation of his employer that his employees would do just as Southern did if the occasion arose. It is quite inconceivable that any employer should expect or would direct his employees to stand still under such circumstances. It seems to us that the accident arose out of his employment. (The Workmen's Compensation Law is framed on broad principles for the protection of the workmen. Relief under it, generally speaking, is not based on the negligence of the employer, nor limited to the absence of negligence on the part of the employee. It rests on the economic and humanitarian principles that compensation should be given at the expense of the business to the employee, or his representatives, for earning capacity destroyed by an accident in the course of, or connected with his work; and this not only for his own benefit, but for the benefit of the State which otherwise might be charged with his support. We think this purpose ought not to be defeated by placing too narrow a limit upon the nature of facts which will be regarded as pertaining to his employment.) Of course, what we thus say is to be read in the light of the facts presented in this case.

The Commission upon the foregoing cannot do otherwise than conclude that the accident arose out of and in the course of the employment as found.

We had before us an excellent brief prepared by counsel for the defendants, but we are not satisfied that the defendants' contentions are sound, and it is our conclusion under the evidence presented that the deceased met with a fatal accident arising out of and in the course of his employment, and that the dependent widow and children are entitled to compensation; we, therefore, make the following award:

Award

It is ordered that the defendants pay to Mrs. J. P. Southern, Stanford Southern, Elaine Southern, and Talmadge Southern, compensation at the rate of $13.58 per week, payable weekly, for a period of three hundred and fifty weeks; and funeral expenses not to exceed $200; and the defendants further pay all medical and hospital fees in connection with this case. Further, that the receipt of Mrs. J. P. Southern, wife of the deceased and natural guardian of Stanford, Elaine, and Talmadge Southern, shall acquit and fully and completely discharge the defendants of all claims or demands of the said minor children. Further, that upon said minors reaching his, her, or their majority, they may appeal to this Commission for an amended award; the defendants to pay the cost of this hearing.

Vol. I Pages from 73 to 138

ADVANCE SHEETS

OF

OPINIONS IN CASES

HEARD AND DETERMINED
BY THE

NORTH CAROLINA INDUSTRIAL COMMISSION

RALEIGH

DECEMBER, 1929

OPINIONS TO DECEMBER 1

SUBSCRIPTION PRICE $5.00 PER YEAR
IN ADVANCE

PUBLISHED FOR THE COMMISSION
BY
EDWARDS & BROUGHTON COMPANY
RALEIGH, N. C.

Admission applied for as second-class matter November 12, 1929,
at the post-office at Raleigh, North Carolina,
under the Act of March 3, 1879.

PUNCHED TO FIT BINDER SUPPLIED BY EDWARDS & BROUGHTON COMPANY, RALEIGH

INDEX

Case *Page*
J. A. McDade *v.* Raleigh-Hopewell Company et al 73
M. J. Grissett *v.* Knox Furniture Company et al 74
Ed Bumgarner *v.* McNeely and Dillard 78
R. A. Loftis *v.* Kane Construction Company et al 80
Hallie Johnson *v.* Tar Heel Mica Company et al 82
Ernest Crowder *v.* Carolina Mineral Company et al 83
Earl Crowder *v.* Carolina Mineral Company et al 84
Lewis H. Johnson *v.* Asheville Hosiery Company et al 88
W. R. Logan et al *v.* Elliott Building Company et al 90
Tom Wilkinson *v.* Marion Veneer Company et al 92
James McNeely *v.* Morganton Furniture Company et al 93
Harvey Staley *v.* Sandhills Furniture Company et al 94
R. C. Coffey *v.* Cannon Mills Company 97
L. E. Boykin et al *v.* Hinnant-Nash Company et al 99
Harvey N. Morgan *v.* Town of Smithfield et al 101
Rosabell Smith *v.* Collins-Aikman Corporation et al 102
Jim Tantney *v.* Kitchen Lumber Company et al 105
Willow Ballard *v.* Cannon Mills Company 107
Elbert Ledford *v.* Victory Yarn Mills et al 113
Hubert Samuel et al *v.* Long Construction Company et al 114
Sam Gilbert *v.* Welch Furniture Company et al 116
Hettie H. Smith *v.* Carolina Power & Light Company 117
M. S. Hayes *v.* Libes & Mathis et al 122
Melvin Williams *v.* J. Marvin Thompson et al 124
Henry Hodges *v.* Rowland Lumber Company et al 128
Robert B. Harden *v.* Thomasville Furniture Company et al 131
Cobert Simpson *v.* Cannon Mills Company 135

NORTH CAROLINA INDUSTRIAL COMMISSION

MATT H. ALLEN, CHAIRMAN
J. DEWEY DORSETT
T. A. WILSON
COMMISSIONERS

E. W. PRICE, SECRETARY

ELEVENTH FLOOR RALEIGH BANK & TRUST BUILDING
RALEIGH, N. C.

[Docket No. 93]

W. A. McDADE, Employee, Plaintiff, v. RALEIGH-HOPEWELL ICE AND COAL COMPANY, Employer, and AMERICAN MUTUAL LIABILITY INSURANCE, Carrier, Defendants

Filed November 29, 1929

ASSAULT.—Where assault made was not provoked by employee injury resulting arose out of and in the course of the employment.

Hearing before J. DEWEY DORSETT, Commissioner, in the Hearing Room of the North Carolina Industrial Commission at Raleigh, November 27, 1929.

Mr. C. A. Anderson, representing the American Mutual Liability Insurance Company, Defendant.

Opinion by DORSETT, Commissioner.

Findings of Fact

W. A. McDade, the claimant, was on September 1, 1929, and some time prior thereto, had been an employee of the Raleigh-Hopewell Ice and Coal Company.

While he was engaged in and about his regular duties as a truck-driver, he was attacked by a colored boy who worked for a customer of the Defendant Ice Company, and whose truck was at defendant's place of business at the time of the assault for the purpose of getting a load of ice. From the evidence it seems that the truck (driven by the colored boy) had passed this defendant, nearly striking him, and at the time this colored boy made some remark to this claimant. When the colored boy returned, he brushed up against this claimant, and was told to "Look out, Boy," and said something to this claimant. From this the assault took place, the colored boy throwing a spike into the face of this claimant, breaking his jaw-bone, and otherwise injuring him.

The carrier defendant in this proceeding sets up as a defense that the injury complained of arose out of an altercation between the claimant and the colored boy and was occasioned as a result thereof. The evidence clearly shows that the assault upon the claimant was not provoked, and the defense relied on is without merit, and the injury complained of arose out of and in the course of the employment of the said W. A. McDade while actively engaged in the duties of his employment with the Raleigh-Hopewell Ice and Coal Company. At the time of the injury the claimant was making $4.00 a day, and from the evidence it is found as a fact that he was totally disabled for a period of ten days. An award will therefore be issued, awarding compensation at the rate of 60 per cent of $28.00 per week, or $16.80 for a period of 3/7 weeks. The defendant carrier will pay medical and hospital bills incurred, and the cost of this proceeding.

[Docket No. 59]

M. J. GRISSETT, Employee, Plaintiff, v. KNOX FURNITURE COMPANY, Employer, and EMPLOYERS LIABILITY ASSURANCE CORPORATION, Carrier, Defendants

Filed November 27, 1929

DISEASE.—Heat stroke, paralysis. Where employment subjects employee to conditions more conducive to heat stroke than the general public is subjected to, disability or death resulting is compensable. Where claimant not exposed to any greater degree of heat because of his job than were his fellow employees or the public in general nor where conditions under which work being done would cause undue exhaustion claim denied. The rational mind must be able to trace the resultant injury to a proximate cause set in motion by the employment and not by any other agency.

Hearing before J. DEWEY DORSETT, Commissioner, at High Point, Guilford County, N. C., November 6, 1929.

Plaintiff represented by *Mr. Thomas Turner, Jr.*, of *Austin & Turner*, Attorneys, of High Point, N. C.

Defendants represented by *Messrs. King and Sapp*, of *King, Sapp & King*, Attorneys, of Greensboro, N. C.

Opinion by DORSETT, Commissioner.

Statement of the Case

This claim for compensation is denied on the part of the defendants because they contend that Section 2 (f) of the Compensation Act has not been met. Their contention is that if there was an accident to the plaintiff due to his becoming overheated, that the accidental injury did not "arise out of the employment." They further contend that the claimant's disability is due to a disease and that his employment on July 8, 1929, had nothing to do with the present disability; that the employment on that extremely hot July day did not aggravate or accelerate his preëxisting condition, and therefore would not be chargeable under the provisions of our Compensation Law to his employment.

On the other hand, the plaintiff contends that his present disability was proximately caused by an accidental injury that arose out of and in the course of his employment; that he was on July 8 on his usual job with the defendant employer; that he suffered the accident when he became overheated; that his becoming overheated was caused by the employment. He further contends that should the Commission find that he was diseased, that we should also find that his employment on July 8, aggravated or accelerated his disease, causing his further disability. He contends that there causal connection between the job and the accident he sustained, resulting in his being permanently and totally disabled, and asks the Commission to so find.

The evidence shows that the claimant was at work on July 8, and whatever happened to him happened while he was in the course of his employment. "The words 'in the course of his employment' relate to the time, place, and circumstances under which an accident takes place, and an accident arises in the course of his employment when it occurs within the period of the employment, at a place where the employee may reasonably be in the performance of his duties, and while he is fulfilling his duties or engaged in doing something incidental thereto." *New Amsterdam, etc., Company v. Summerell*, Ga., 118 S.E., 786.

There is no serious difference between the parties to this case concerning the wages earned by this claimant during the past twelve months, and the average weekly wage from the evidence appears to be $15.81. The Compensation Law of 1929 applies to the contract of employment existing between the claimant and defendant on July 8, 1929.

It appears to the Commissioner that there are two questions to be determined, and it comes down to this; did the claimant suffer an accident that arose out of his employment, and if so, did the accident aggravate a preëxisting disease so as to cause the disability resulting in total loss of use of the claimant's right arm and right leg, justifying an allowance of compensation for the same?

The claimant says that six or seven other employees were right there with him, working in close proximity to him, and that none of them were overcome by the heat; that he had been on this job for three years; that he worked in the finishing room, and his job was sanding furniture. In describing just what happened to him, the claimant had this to say, "I was just behind the spray box in that hot place there, doing some work, and all at once it come on me; it seemed like I was going to fall down and I had to sit down on a box a while. Then I recovered and came over there and tried it again, and it come on me again. This all happened sometime between two and three o'clock in the afternoon; I kept on working that way all afternoon; I stayed with it until the whistle blew. I knocked off and started to go out in the hall, and when I started to turn around I liked to have fallen. I told my foreman and employees that something had gone radical with me, and they replied, 'something bad is the matter with you.' "

It is in evidence that this finishing room where the claimant worked is on the top floor right next to a tin roof; that this department occupied the whole floor of the factory, one block in length; that this plaintiff and others worked between one side of the building and two spray boxes that were about fifteen feet apart and about the same distance from the wall. The record discloses the fact that there are no fans in this room due to the fact that it is a finishing room where painting is done, but the record fails to establish the fact that the claimant's place of work was cut off from whatever air was circulating that day. Some of the claimant's fellow employees testified that it was extremely hot in the room where they were working that day, and they further testified that it had been hot on several days during the past summer. One J. O. Crocker, a fellow employee, testified that he had worked in furniture factories for twelve years and during this time his work had been in the finishing department; that the place where they were working on July 8 was unusually hot, but he would not say it was the hottest day of the summer; that there was not any unusual condition existing in the finishing room at that particular time; that he did not notice any unusual activity; and that this claimant always worked hard.

Dr. I. T. Mann is the attending physician for this claimant and testifies that he saw him the morning after July 8, and that he had some paralysis in his right leg and right arm; that he had a blood pressure of 196; and that he saw him on the next day and the paralysis had increased to some extent; that he had lost use of himself, and could not control any of the muscles of his right arm or leg. Since then, under treatment, he has made some improvement. His blood pressure has been as low as 168, but has gone back up again. In his opinion two factors enter into the claimant's present condition; one thing is the high pressure under which he was working, and the other thing was the heat; that it was a case of heat exhaustion, and that he possibly had a stroke, in the opinion of the doctor. Dr. Mann was of the opinion that this claimant had high blood pressure, that he got overheated, throwing an extra load upon him, and that a fuse plug was blown out; he had a load that he could not carry. Dr. Mann further testified, "I do not think anybody would dispute the fact that he had high blood pressure prior to the time of this trouble, and a man of high blood pressure working under this strain and under overheated conditions is more liable to have it than a normal man."

Dr. W. W. Harvey was called by the defense to state that he examined the plaintiff on the date of this hearing and found his blood pressure 210 over 140—systolic and diastolic; that normally the blood pressure should be around 140-150. Dr. Harvey further testified that in his opinion from all of the symptoms that he thought the claimant had suffered an ordinary stroke of paralysis, instead of a heat stroke. Both doctors testified that a man with high blood pressure could have a stroke of paralysis at home in bed, or on the street, and without any exertion; that it frequently develops during sleep; that any exertion that a man with high blood pressure was given to would cause it.

In view of all the evidence, and considering all the cases cited bearing on this question, the Commissioner makes the following

Findings of Fact

1. The parties, plaintiff and defendants, are bound by the provisions of the North Carolina Workmen's Compensation Act.

2. That on July 8, 1929, the plaintiff suffered a heat stroke or prostration which occurred during the course of his employment by the defendant Knox Furniture Company.

3. That the said heat stroke, or prostration, was not an injury by accident that arose out of the said employment.

4. That the plaintiff on July 8, was not exposed to any greater degree of heat by reason of his employment than were his co-employees or the public in general.

5. That the average weekly wage of the plaintiff at the time of the alleged accident was $15.81.

Conclusions of Law

The general proposition is well established that when heat stroke is suffered by reason of the employment subjecting the employee to conditions more conducive to heat stroke than the general public is subject to, disability or death resulting from such heat stroke arises out of and in the course of the employment. In the instant case, however, the record does not disclose any facts to show that the claimant was exposed to any greater degree of heat because of his job than were his fellow employees, or the public in general, nor does it appear that the work claimant was doing was of a heavy nature or that the work was being done under conditions that would cause any undue exhaustion to the claimant. Although the record discloses the fact that business was good and orders were behind, there is no evidence of instruction being given to this claimant to rush his work, nor is there any evidence that the claimant was in a rush that was out of the ordinary on July 8, thus placing him under any out-of-the-ordinary strain. The record discloses the fact that it was a very hot day; several of the claimant's fellow employees testified that it was hot that day and that they felt the results of the hot weather. It is a matter of common knowledge that we have hot days in North Carolina in July and August.

One of the doctors in the instant case says that the present condition of the plaintiff is due to two things; the doctor expressed it in this manner: "I think the work was increased that morning; they were being rushed to get out some orders . . . he was working under high pressure . . . the other thing was the heat . . . or possibly he had a stroke of paralysis." There is no evidence in the record that this plaintiff was working under high pressure or that his work was increased the day of the accident. The doctor was not so satisfied that the work and heat caused the trouble, because he adds that he possibly had a stroke of paralysis. This medical expert went further and testified that from examinations he had made and from observing his patient he was of the opinion that he was suffering from high blood pressure prior to the trouble on July 8.

Dr. Harvey was called as a witness for the defendants and testified that he examined the plaintiff on the date of this hearing, some two months after the accident, and found his blood pressure 210 over 140—systolic and diastolic; and from this examination and after talking with Dr. Mann, the attending physician, concerning the patient's symptoms, he came to the conclusion that this plaintiff suffered a stroke of paralysis.

Because of some little conflict in the opinions of the two doctors testifying in this case, this claimant was ordered to go to Raleigh for an examination by the medical director attached to this Commission. This examination disclosed the following facts: "Physical examination shows partial paralysis in right arm and right leg. He has definite hardening of the arteries. His systolic blood pressure is 240, his diastolic is 126. His heart is enlarged. His urine shows albumen. He has a permanent disability. Any undue physical or mental strain is liable to induce another stroke of paralysis. I feel certain that the condition of his blood pressure, his heart and arteries is of long standing and any undue strain prior to July 8, 1929, would have induced a similar train of circumstances. It is possible that the extreme heat on the day mentioned could have induced his stroke of apoplexy. You must bear in mind, however, the frank and progressive disease of his heart, blood vessels and kidneys. It is in an advanced stage. He could easily have a stroke during his sleep as well as on the street or at work."

The evidence is overwhelming that the weather was hot, but evidence is lacking to establish that the condition under which Grissett worked exposed him to forces of nature to a greater extent than he would have been if not so engaged. That the plaintiff is an elderly man and did not bring with him into his task the bodily vigor and powers of resistance enjoyed by younger men in the same work does not mitigate his claim for compensation. The law places upon this claimant the burden of establishing a causal connection between his job, the conditions under which he had to work, and the injury. In the instant case he has failed to establish such a connection, and compensation must be denied.

The ultimate purpose of the Workmen's Compensation Act is to treat the cost of personal injuries incidental to the employment as a part of the cost of the business. It does not afford compensation for injuries or misfortunes which are merely contemporaneous or coincident with the employment, or collateral to it. The essential connecting link of direct causal connection between the injury and the employment must be established before the act becomes operative. The injury must be the result of the employment, and flow from it as the inducing proximate cause. The rational mind must be able to trace the resultant injury to a proximate cause set in motion by the employment, and not by any other agency, or there can be no recovery. Madden's Case, 222 Mass., 494, 111 N. E., 379, L. R. A. 1916 D, 1000. Two things are necessary to make a claim compensable under the act; the injury must "arise out of" the employment, and it must be received "in the course of" the employment. Neither alone is enough. McNicol's case, 215 Mass., 497, 102 N. E., 697; *Larke v. Hancock Mutual Life Ins. Co.*, 90 Conn., 303, 97 A., 320, L. R. A., 1916 E, 584; *Bryant v. Fissell*, 84 N. J. Law, 72, 86 A., 458.

Compensation is denied; the claim is dismissed; each side will pay its own costs.

[Docket No. 65]

ED BUMGARNER, Plaintiff, v. C. R. McNEELY and T. A. DILLARD, Partners, T. A. McNEELY & DILLARD, Employers, Defendants, Non-Insured

Filed November 27, 1929

LUMP SUM.—Where it is to best interests of employee and an uninsured employer is in process of dissolution lump sum award will be made.

Hearing before Matt H. Allen, Chairman, at Sylva, Jackson County, N. C., on November 13, 1929.

Plaintiff represented by *Mr. Dan K. Moore*, Sylva, N. C.
Defendants represented by *Mr. W. R. Sherrill*, Sylva, N. C.

Opinion by ALLEN, Chairman.

Statement of the Case

This was a claim from Jackson County heard before MATT H. ALLEN, Chairman, on November 13, 1929.

The defendant copartnership has failed to provide compensation insurance as provided by the Compensation Act. T. A. Dillard, one of the partners, had filed notice of rejection but the notice referred only to the operations of Dillard individually and not to the partnership operations. The Commission finds that the failure of the copartnership to comply with the provisions of the Compensation Act was due to the misunderstanding of the copartner Dillard as to what, in law, constituted a copartnership.

It appears from the evidence that C. R. McNeely and T. A. Dillard had been engaged for some time, and more than a year, in logging and timber operation, and that the firm was well known and advertised in the immediate section; that Dillard was the active partner and McNeely was engaged in general merchandising, including hardwood lumber, but participated in the profits; that no notice of dissolution was given or advertised; that McNeely participated in the profits or loss of the particular operation in which claimant was injured; that at the time of the injury the defendants employed more than five persons.

Upon the admitted facts the Commission finds that the defendants, T. A. Dillard and C. R. McNeely, were at the time of the injury copartners employing five or more persons and subject to the provisions of the Workmen's Compensation Act; that as such copartners they are jointly and severally liable to plaintiff for compensation.

It was admitted that the claimant was employed by T. A. Dillard at the time of the accident and injury, and that the accident arose out of and in the course of the employment; and that his average weekly wages were $19.50 per week.

Plaintiff sustained an injury to his foot on July 25, 1929, while engaged in peeling logs on Trout Creek in Jackson County.

Dr. F. Angel testified that he treated plaintiff and that plaintiff had a break and contusion and that bones and part of the foot were injured; that claimant had been disabled since July 25, and that in his opinion the disability would continue until February 1, making a total of six months.

Claimant testified that he had been disabled since the accident; that he had paid Dr. Angel $25.00 for medical services and $10.00 for automobile hire in going to and from the hospital.

Upon the foregoing admissions and evidence the Commissioner further finds as a fact that claimant has been totally disabled since July 25 and that total disability will continue until February 1, 1930.

It is ordered that award issue providing for the payment by the defendants, T. A. Dillard and C. R. McNeely, and each of them $11.70 per week for a period of twenty-seven and 2/7 weeks, plus $25.00 medical expense advanced by claimant and plus $10.00 automobile hire advanced by plaintiff, and the cost of this hearing, including expert fee of $10.00 and mileage (44 miles) to Dr. F. Angel.

The plaintiff moves for a lump sum award upon the grounds that the defendant copartnership has suspended operations since the injury and that said partnership is now in process of dissolution, and that a weekly award would involve complications and delay. The Commissioner is of the opinion that a lump sum award will be to the best interest of claimant and will not work any hardship upon defendants, and it is ordered that nine weekly payments not due be commuted and paid at once, together with the $35.00 advanced by claimant.

The Commission approves a fee of $35.00 for Dan K. Moore, Attorney, which amount will be paid by plaintiff.

[Docket No. 64]

R. A. LOFTIS, Employee, Plaintiff, v. GEORGE KANE CONSTRUCTION COMPANY, Employer, and GLOBE INDEMNITY COMPANY, Carrier, Defendants

Filed November 26, 1929

DISEASE.—Frostatitis and kidney stones. Where injury is not result of accident and was not proximately caused by the employment or the conditions under which employee was required to work claim dismissed.

Hearing before J. DEWEY DORSETT, Commissioner, at Durham, N. C., November 9, 1929.

Plaintiff represented by *J. R. Edmunds, Jr.*, Attorney.
Defendant represented by *F. L. Fuller, Jr.*, Attorney, and *C. V. DeVault*, Claims Manager, for the Globe Indemnity Company.

Opinion by DORSETT, Commissioner.

Statement of the Case

The claimant is a carpenter, and at the time of the alleged accident was a foreman for his employer, the George Kane Construction Company. The defendant is engaged in the construction business, with his principal office in the City of Durham, N. C.

The parties, plaintiff and defendant, are bound by the provisions of the North Carolina Workmen's Compensation Law of 1929; and at the time of the alleged accident the claimant was regularly employed by the defendant employer at a wage in excess of $30.00 a week. The claimant contends that on August 5, 1929, while performing his regular duties as a carpenter foreman, he was injured; that the injury was caused by picking up a piece of timber, 2x10 in size, and weighing between 150 and 200 pounds, and throwing the said piece of timber out of his way; that the injury hurt his back, but the pain was not very great at the time, and that it felt like a catch in his back. He went to see a doctor two days after the injury, complaining of blood in his urine. He said nothing to his fellow employees or to his employer, concerning the accident, at the time it occurred. The accident was reported to the employer two days after the occurrence of it, the claimant continuing to work until the 14th day of August, something like a week after the occurrence of the accident. The records of the employer show that the 14th of August was the first day that he lost; that on the 15th, due to a change in jobs, there was no work going on. However, he left the job on the 16th and returned on the 21st, and continued to work without any interruption due to his injury until the 26th, when his job gave out.

Dr. Upchurch, the attending physician, testifies that Mr. Loftis came to him complaining of blood in his urine; that he gave him an examination, the examination revealing the fact that he had a markedly enlarged prostate; that there was a considerable amount of blood and a small amount of pus in his urine, that he found the claimant free of any venereal infection. He found a markedly inflamed and congested tract down to the prostate where the blood was coming from, and an X-Ray showed kidney stones. The doctor further testified that he thought the accident complained of could be the cause of the claimant's present disability; that he gave him a final examination on the 12th of September, and was of the opinion that the plaintiff could work just as well by the 1st of November as he could before the alleged injury; that a strain in lifting varies according to the individual and depends on whether or not he had any focus of infection in his body. Asked the question if he thought lifting a piece of timber such as described was sufficient to cause the condition as found, he answered that it is possible it would.

Dr. W. M. Coppridge testified that in 1927 he saw this claimant and gave him an examination, and at that time he found some pus in his prostate and advised the claimant that he had chronic prostatitis and infected tonsils. Dr. Coppridge testified that the claimant at that time was not badly sick; that he was continuing to work, and came to him complaining of backache. He found no indication at that time of any venereal disease. Dr. Coppridge testified that he thought it perfectly possible for a sudden injury or strain to cause pressure or congestion just like a cold may cause the tonsils to light up.

From all the evidence the Commissioner makes the following

Findings of Fact

1. R. A. Loftis, employee, and the George Kane Construction Company, employer, are bound by the provisions of the North Carolina Workmen's Compensation Law.

2. The plaintiff has failed to sustain the burden of proof placed upon him to establish by a greater weight of the evidence that he accidentally injured himself on August 5, while in the employ of the George Kane Construction Company; therefore failing to meet the requirements of Section 2, Subsection (f), of the Compensation Act.

3. The plaintiff at the time of the alleged injury was earning in excess of $30.00 per week.

Conclusions of Law

An injury "arises out of" the employment, within the meaning of the North Carolina Workmen's Compensation Act, when it occurs in the course of the employment and is the result of a risk involved in or incident to the employment, or to the conditions under which it is required to be performed. This situation cannot be found to exist unless it appears that the injury, whether it be the result of an accident or disease, was proximately caused by the employment or the conditions under which the employee was required to work.

The acceleration or aggravation of a preëxisting disease is compensable under our Law, providing that an accident, arising out of and in the course of the employment was a proximate cause developing that condition.

We have here a man who visited his doctor in 1927, complaining of his back; the examination made at that time disclosed the same condition as the examination disclosed to be existing just after the alleged accident on August 5, 1929.

This Commission is unable to find that under the Compensation Law an award can be made in this case. The claim is therefore denied and dismissed; each side will pay its own costs.

[Docket No. 56]

MRS. HALLIE JOHNSON, Plaintiff, v. TAR HEEL MICA COMPANY, Employer, and GLOBE INDEMNITY COMPANY, Carrier, Defendants

Filed November 26, 1929

SPECIFIC DISABILITIES.—Fingers. Loss of one and one-quarter phalanges of a finger is "loss of more than one phalange" and "considered as loss of the entire finger."

Hearing before MATT H. ALLEN, Chairman, at Plumtree, Avery County, N. C., on November 5, 1929.

Plaintiff represented by *Mr. John C. McBee*, Spruce Pine, N. C., and *Mr. Charles Hutchins*, Burnsville, N. C.

Defendants represented by *Mr. Paul B. Clark*, 110 West Main Street, Gastonia, N. C., and *Mr. P. W. Garland*, Attorney, Gastonia, N. C.

Opinion by ALLEN, Chairman.

Statement of the Case

It was admitted that the claimant was in the employ of the defendant, Tar Heel Mica Company, at the time of the injury; that the accident arose out of and in the course of the employment, and that the average weekly wage of the claimant was $8.40.

On August 31, 1929, the claimant lost one and one-quarter phalanges of her index finger and one and one-half phalanges of her middle finger of the right hand.

The Commissioner finds as a fact that claimant lost one and one-quarter phalanges of her index finger and one and one-half phalanges of her middle finger, and that the loss of one and one-half or one and one-quarter phalanges is a substantial loss of more than one phalange.

The defendant carrier contends that inasmuch as only one-fourth of the second phalange of the index finger was amputated that claimant is entitled to the loss of only one-half of the finger instead of the whole. Counsel for the defendant carrier contends that where as much as one-half of the phalange is amputated the claimant is entitled to the loss of the whole finger. Sub-section (g) of Section 29 provides that "the loss of more than one phalange shall be considered the loss of the entire finger or thumb."

The Commission is unable to agree with the contention of the defendant's counsel. There appears to be no ambiguity in the wording of sub-section (g) above quoted. The Compensation Act must be interpreted with fair liberality to the end of securing the benefits which it was intended to accomplish.

If there shall arise a case in which the loss of the second phalange is so proportionately small and of such character as not to diminish the power and use of the finger to any greater extent than if the injured had only lost one phalange, another question may be presented.

It is ordered and adjudged that an award issue providing for the payment to the claimant of the sum of $7.00 per week for a period of sixty-five weeks. The payments to begin on the 31st day of August, 1929, and that the defendants pay the cost of this hearing.

[Docket No. 43]

ERNEST CROWDER, Plaintiff, v. CAROLINA MINERAL COMPANY, Employer, and THE GLOBE INDEMNITY COMPANY, Carrier, Defendants

Filed November 25, 1929

Specific Disabilities.—Fingers. Loss of one and one-third phalanges of a finger is "loss of more than one phalange" and "considered as loss of the entire finger."

Hearing before Matt H. Allen, Chairman, at Bakersville, Mitchell County, N. C., on November 5, 1929.

Plaintiff represented by *Mr. John C. McBee*, Spruce Pine, N. C., and *Mr. Charles Hutchins*, Burnsville, N. C.

Defendants represented by *Mr. Paul B. Clark*, 110 West Main Street, Gastonia, N. C., and *Mr. P. W. Garland*, Attorney, Gastonia, N. C.

Opinion by Allen, Chairman.

Statement of the Case

It was admitted that the plaintiff was in the employ of the defendant, Carolina Mineral Company, and that the accident arose out of and in the course of the employment; that all medical and hospital bills have been paid; that his average weekly wage at the time of the accident was $18.00 per week.

Dr. C. A. Peterson testified that he amputated the index finger of the claimant on the left hand through the first joint and that claimant lost only the first distal phalange; that he amputated the middle finger of the left hand below the first joint and that the claimant lost the first distal phalange and one-third of the second distal phalange.

The Commissioner finds as a fact that claimant lost the first distal phalange of the index finger of the left hand and one and one-third phalanges of the middle finger of the left hand and that one and one-third phalanges is a substantial loss of more than one phalange.

The plaintiff contends that he lost one phalange of the index finger and that he lost one and one-third of the middle or second finger. He claims compensation for the loss of one-half of the finger in the case of the index finger and compensation for the whole finger in the case of the middle finger.

The defendant insurance carrier contends that inasmuch as claimant lost only one-third of the second and distal phalanges of the middle finger he is only entitled to compensation for the loss of one and one-half fingers.

The Commission has decided in the case of Mrs. Hallie Johnson v. Tar Heel Mica Company, filed November 25, 1929, that this position is in conflict with sub-section (g) of Section 29 of the Workmen's Compensation Act, which provides that "the loss of more than one phalange shall be considered the loss of the entire finger or thumb."

It is thereupon ordered and adjudged that an award issue providing for the payment to the plaintiff by the defendants of $10.00 per week for a period of forty-seven and one-half weeks, payments to begin on the 27th day of August, 1929.

[Docket No. 58]

EARL CROWDER, Plaintiff, v. CAROLINA MINERAL COMPANY, Employer, and THE GLOBE INDEMNITY COMPANY, Carrier, Defendants

Filed November 26, 1929

MEDICAL TREATMENT AND CARE.—Inexcusable neglect to provide proper and necessary medical attention and treatment causing arthritis, resulting in stiffness of wrists and loss of motion award will direct needed treatment, hospitalization and operation to reduce permanent loss of use; also compensation for temporary total disability until claimant's injury assumes permanent status.

INSURANCE RATES.—Unnecessary medical and hospital costs resulting from failure to furnish proper treatment at time of occurrence of injury is reflected in future rates penalizing entire industry.

Hearing before MATT H. ALLEN, Chairman, at Bakersville, Mitchell County, N. C., on November 5, 1929.

Plaintiff represented by *Mr. John C. McBee*, Spruce Pine, N. C., and *Mr. Charles Hutchins*, Burnsville, N. C.

Defendants represented by *Mr. Paul B. Clark*, 110 W. Main Avenue, Gastonia, N. C., and *Mr. P. W. Garland*, Attorney, Gastonia, N. C.

Opinion by ALLEN, Chairman.

Statement of the Case

It was admitted that the claimant was in the employ of the defendant at the time of the injury; that the accident arose out of and in the course of the employment; that the average weekly wage of the claimant was $18.00 per week.

On August 20, 1929, the claimant who is a man thirty years of age, with a wife and six children dependent upon him, was employed by the Carolina Mineral Company as a mucker, and while standing on a ladder in the quarry in the act of prizing a rock from the side of the tunnel, fell from the top of the ladder, a distance of thirty-five feet, on a pile of rocks below, resulting in the fracture and dislocation of the carpal bone (semi-lunar) of the right wrist joint. Claimant was sent, by his employer, to a local doctor who bandaged the wrist without attempting to reduce the dislocation. The local physician, in reporting the accident, diagnosed the case as follows: "Badly contused and lacerated right forearm—middle finger left hand. Bruised right hip." The employer also reported the accident and made no mention of any fracture or dislocation, and estimated that claimant would be able to return to work in ten days.

It appears from the evidence that the local doctor observed the plaintiff's wrist at intervals over a period of two weeks, after which time he removed the bandages and discharged the plaintiff; that upon discharge of plaintiff by the local doctor, he, (claimant), at his own expense, called upon a Dr. Deaton for an X-ray of his wrist; that on September 14 he reported to the office of the Carolina Mineral Company; that on the said date an agreement for compensation for disability was tendered to claimant and signed by him; that the injury of claimant as set forth in the agreement for compensation was described as, "Right arm strained and hip bruised"; that by the terms of said agreement for compensation, plaintiff was to receive compensation for two and six-sevenths weeks at the rate of $10.80 per week; that claimant was paid the sum of $30.86 on September 14, 1929; that five weeks after the agreement for compensation was entered into, and seven weeks after the accident, claimant was sent to Asheville, North Carolina, for examination and X-ray; that between the date of the accident and the time claimant was sent to Asheville, North Carolina, for X-ray and examination, arthritis had developed in the wrist joint to such an extent that an operation at that time was found to be inadvisable; that X-ray and examination revealed a fracture and dislocation of the carpal bone (semi-lunar) with marked arthritis, (which condition must have been reported to the employer and the defendant insurance carrier) that after the diagnosis by the Asheville surgeons no report was made to the Industrial Commission; no compensation was paid to the claimant, and no medical services tendered him until the date of hearing, November 5, 1929, which hearing was had upon application of claimant.

This record presents the most conspicuous and inexcusable case of neglect that has come before the Industrial Commission since the Compensation Act has been in force.

The Commission can understand how a physician could fail to diagnose a fracture or even a dislocation of the tarsal (semi-lunar) bone in a case where there is extreme swelling, and this may have been the condition in the present case when the claimant first presented himself on the day of the accident, but it appears from the evidence that the claimant was under the doctor's care for two weeks, at the end of which time the bandage was removed and the patient discharged as fully recovered and ready to return to work.

It is a matter of common knowledge that swelling from an ordinary fracture or dislocation will subside usually within three or four days and only in exceptional cases will the swelling continue for more than a week or ten days. Surely the swelling had subsided when this claimant was discharged two weeks after the accident, otherwise the doctor would not have discharged him and certified that he was able to return to work. If the swelling had subsided it would seem that the most casual examination would have revealed the dislocation, and if the fracture and dislocation had been discovered at that time and before arthritis set in, and proper medical attention furnished the claimant, the use of his hand might have been and probably would have been restored to practically normal condition at a comparatively small cost to the defendants.

Not only was this employee neglected during the first two weeks but for the succeeding five weeks after his discharge, he was left to toil along as best he could without any medical attention or compensation and with only the use of his left hand to earn a livelihood for his wife and six small children. Finally, after seven weeks, and on or about October 12, he was sent to Asheville by the defendants for examination and diagnosis.

It appears from the evidence that the fracture and dislocation were revealed by this examination and that arthritis had set in to such a degree that an operation would endanger his life.

Dr. Edward King testified that the fracture and dislocation were complicated with arthritis; that at the time he examined plaintiff his wrist and fingers were stiff; wrist painful of motion, with a limitation of motion; that the proper treatment for claimant will be several weeks rest in a hospital with proper measures to remove the arthritis before an operation; that in his opinion if the arthritis infection is removed plaintiff will have only thirty-five per cent loss of use of the hand.

Dr. A. F. Reeves testified that it was very essential to get rid of the arthritis infection before an operation; that the plaintiff needed treatment and an operation after arthritis was removed; that if claimant had been sent to him immediately after the accident he would have had X-ray made and attempted to put dislocated bone back in its proper place; that in his opinion it takes arthritis from one week to ten days after the injury to develop; that claimant had a severe case of pyorrhea which could have produced the arthritis; that there had evidently been a slight infection in a wound on claimant's hand; that if claimant got infection in an open wound it could have caused arthritis; that in his opinion claimant has a present loss of use of from fifty to sixty per cent, but that if arthritis is removed the disability will be decreased to about thirty per cent.

The only excuse or defense offered by the defendant carrier for this neglect is that the claimant upon xamination seven weeks after the accident was found to have pyorrhea and a few bad teeth, which condition it is claimed *might* or *could* have caused the arthritis and that the arthritis aggravated the inflamation caused by the fracture and dislocation. The result is that this claimant in his present condition has practically lost the entire use of one hand and in order to reduce the percentage of loss of use the defendant carrier must bear the expense of hospitalization over a period of several weeks, to be followed by an operation, and in the meantime paying to the claimant compensation for total disability.

In addition to the hardship and injustice to the claimant this neglect penalizses the particular employer and the entire industry of the State through future rates which will be based upon experience and accident cost.

The underlying philosophy of Workmen's Compensation is rehabilitation and reëstablishment. The Act contemplates prompt and competent medical services and hospitalization when necessary. The position of the defendant carrier that the failure to provide medical attention and compensation to this claimant is justified on account of the arthritis infection which may have been produced from pyorrhea is highly technical and indefensible. Such a technical position has no place in the practice and procedure under the Workmen's Compensation Act.

The Commissioner finds the following facts, viz: that the claimant is at the present time totally incapacitated to perform the manual labor in which he was engaged at the time of the accident; that the present condition of the claimant is due largely to neglect on the part of the physician who first attended him, and neglect on the part of the defendants in failing to furnish medical and hospital attention immediately after October 12, when they were advised of his condition; that the arthritis infection was not produced from pyorrhea but from an infected laceration and wound on the hand near the wrist, inflicted at the same time as the fracture and dislocation, or from some other place in the body; that plaintiff is entitled to hospitalization and medical treatment for a sufficient length of time to remove the arthritis infection, and thereafter to such an operation as competent surgeons shall prescribe; that plaintiff is entitled to compensation at the rate of $10.80 per week for a period not to exceed 397 weeks plus the first week's compensation, amounting to $10.80, which was deducted at the time the agreement for compensation was entered into; that the extent of the loss of use of the hand cannot be properly determined until the claimant shall have received the treatment and operation above mentioned.

It is ordered and adjudged that an award issue providing for the payment to the plaintiff by the defendants the sum of $10.80 per week for a period not to exceed 397 weeks, plus $10.80 for the first week's compensation deducted by the defendants at the time the compensation agreement was entered into, the payments to begin as of September 16, 1929, and to continue until further order by the Industrial Commission. It is further ordered that the claimant be immediately hospitalized and treated at the expense of defendants until such time as the arthritis infection shall be removed, and that immediately thereafter he be given such operation as competent surgeons shall prescribe to reduce the percentage of loss of use of the hand to the minimum.

It is further ordered that this cause be retained for further award at such time as the claimant's injury, after the treatment and operation, shall have assumed a permanent status.

It is further ordered that the cost of this hearing be paid by the defendant carrier.

[Docket No. 17]

LEWIS H. JOHNSON, Employee, Plaintiff, v. ASHEVILLE HOSIERY COMPANY, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed November 25, 1929

REVIEW.—Where greater weight of evidence sustains findings of hearing Commissioner, full Commission will affirm hearing Commissioner's opinion.

AVERAGE WEEKLY WAGE.—Where employment was for short time rate of compensation figured on basis what plaintiff would have earned "were it not for the injury."

Plaintiff was neither represented by counsel, nor appeared in person.

Defendants represented by *M. L. Page*, counsel for the Maryland Casualty Company, Carrier.

Opinion for the full Commission by WILSON, Commissioner.

Review before the full Commission, at Raleigh, N. C., on November 19, 1929, upon the petition of the defendant-carrier from the decision rendered by Commissioner J. Dewey Dorsett, on October 1, 1929. No new evidence was offered.

An award was made in this case in favor of the plaintiff on October 1, 1929, as a result of the hearing which was granted the claimant before Commissioner J. Dewey Dorsett in Asheville, N. C., on September 20, 1929.

Mr. M. L. Page, counsel for the defendant-carrier, contended that:

1. "The injured party is an independent contractor; and

2. "There is some evidence that the injured employee's wage for last year was only approximately $1,100.00; therefore, is not entitled to maximum compensation if anything."

The original opinion by Commissioner Dorsett is an able *Statement of the Case, Findings of Fact, Conclusions of Law*, and *Award*, and the record contains sufficient legal evidence to sustain this opinion and award in respect to the findings and conclusions that the plaintiff was an employee and not an independent contractor. The full Commission is of the opinion that the greater weight of the evidence sustains the opinion of Commissioner Dorsett in this respect, and hereby adopts and affirms the Finding of Fact by Commissioner Dorsett that the plaintiff was an employee of said Asheville Hosiery Company and not an independent contractor as stated in defendant's first contention.

As to the second contention, the Commission has read the record carefully and finds that plaintiff, Lewis H. Johnson, was recalled and testified as follows:

Q. How long have you been a painter? A. Nine years.

Q. Do you know what you have been making on an average per year? A. No, I don't.

Q. You have no idea whatever? A. No, I don't work regular.

Q. You do a considerable amount in your line when you are working regular? A. Yes, sir, during the summer and spring and quite a bit in the fall; in the winter, I hardly do anything.

Q. Do you make as much as three thousand dollars a year? A. No, sir.

Q. Two thousand? A. I don't know.

Plaintiff's father had previously testified under oath, but had not been recalled at this moment when he injected the following statement as to his son's earnings:

Mr. B. G. Johnson: His time will average from $1,000.00 to $1,500.00 a year. He has been in my employ all his life, and according to my time books he makes anywhere from $1,000.00 to $1,500.00 a year. Last year it ran around $900.00.

The father testified the earnings were, "according to my time books." Plaintiff had previously testified: "I work with my father, or any contractor that I can get a job with in town."

Subsection 2 (e) sets forth four rules by which the Commission might compute the "average weekly wage."

The first rule refers to employment of one year or longer, and makes allowances for lost time. This rule is found in the first sentence.

The second rule is found in the second sentence of said Subsection and provides the method whereby an employee's average wages may be computed when his employment is less than one year.

It is under the second sentence that the plaintiff's classification comes. Said plaintiff was employed at $1.25 per hour. Plaintiff worked Saturday afternoon and night, also Sunday afternoon and night. Monday night the plaintiff did not work because he was too tired. Tuesday night he worked until the accident. According to Mr. Baer, "about thirty hours' work had been done." According to the "contract of hire," said plaintiff said his regular scale of wages was one dollar per hour and price and one-half for overtime, but in this case it would be $1.25 per hour. The work was to be done mostly at night when the machinery was stopped. Plaintiff had not finished his first week's work when accident occurred. But taking a conservative estimate of forty-four hours to the week, plaintiff would have earned $55.00 per week, which is $25.00 per week more than necessary to entitle plaintiff to maximum weekly compensation of $18.00, or 60 per cent of $30.00.

The third sentence provides that if by reason of shortness of time, or casual nature, or terms of his employment it is impracticable to compute the average weekly wages as above defined, the Commission can use the earnings of another of the same grade and character employed in the same class of employment. This refers to "contracts of hire" which are very indefinite, piece work, etc.

The fourth sentence, or second paragraph, gives the Commission the right to use "such other method" as would most "nearly approximate" *the* *earnings* "were it not for the injury." See *Peterson v. Riter-Conley Mfg. Co.*, pp. 222-5, Court decisions, Workmen's Compensation Law of Pennsylvania, Vol. VIII, Houck (1926). Case cited is from Common Pleas of Allegheny County.

The last sentence, or third paragraph, gives the Commission the right to consider "allowances of any character" in "lieu of wages" as part of the earnings.

The question before the Commission is not how much the plaintiff earned while working for his father or any other contractor, but how much would the plaintiff have earned per week while in the employment of the Asheville Hosiery Company, "were it not for the injury"? At the agreed rate of pay plaintiff had to work but twenty-four hours per week to earn $30.00, or the necessary amount to allow him the maximum compensation.

Therefore, the Commission feels that Commissioner Dorsett was justified in allowing the maximum compensation to plaintiff.

The full Commission, therefore, adopts the *Findings of Fact*, *Conclusions of Law*, and *Award* contained in the opinion of Commissioner J. Dewey Dorsett, dated October 1, 1929, as the *Findings of Fact*, *Conclusions of Law*, and *Award* of the full Commission.

Therefore, the award of the North Carolina Industrial Commission, dated October 1, 1929, is affirmed and approved.

[Docket No. 66]

W. R. LOGAN, Deceased, SMILEY WILKINS, Administrator of W. R. LOGAN, Plaintiffs, v. ELLIOTT BUILDING COMPANY, Employer, and UNITED STATES CASUALTY COMPANY, Carrier, Defendants

Filed November 25, 1929

DISEASE PRE-EXISTING.—Ulcers of stomach where not proven by clear and satisfactory evidence to be the result of an accident arising out of and in the course of employment. Claim denied.

Hearing before T. A. WILSON, Commissioner, at Lumberton, N. C., November 13, 1929, at 2 o'clock p.m.

Plaintiffs represented by *Mr. Oscar J. Mooneyham*, Attorney at Law, Henrietta, N. C.

Defendants represented by *Mr. Ralph V. Kidd*, Claim Auditor, United States Casualty Company.

Opinion by WILSON, Commissioner.

Summary of Case

The defendants in this case contend that W. Rowland Logan, deceased, is an independent contractor and as such is a subcontractor doing masonry work for the Elliott Building Company; that proper notice was not given employer as provided for in Section 22, and thereby the employer's interest was prejudiced; that deceased did not die as a result of an accidental injury, but as the result of gastric ulcers.

The evidence tends to show that the deceased, W. Rowland Logan, went to work for Elliott Building Company, of Hickory, N. C., at Lumberton, N. C., on July 25, 1929, as a brick mason to build manholes for a sewerage system, at $1.15 per foot; that about 11:30 a.m., on said date, deceased was pushing a mortar box, while his son, Roy Logan, pulled at said box, to remove same from sewer ditch and manhole, and as a result of this unusual effort deceased sustained an injury and suffered severe pains; that said box weighed about 175 pounds; that deceased had gone to a barn about one hundred yards from place of employment following the injury; that shortly thereafter he was removed to a hospital where he was operated upon immediately because deceased continued to suffer excruciating pains in his abdomen.

Dr. H. M. Baker testified deceased's condition was diagnosed as "gastric ulcer," that "a small ulcer penetrating the entire walls of the stomach" was found; that "there was a hole in the wall"; that "it was an old trouble, the wall of the intestines were recently broke"; that ulcer of the stomach "is a serious condition"; that it was a chronic condition; that deceased said prior to death he had never had anything wrong with his stomach; that "I think an ulcer was there and also a rupture that extended through the wall of the stomach"; that in his opinion the injury was the proximate cause of his death.

The evidence tends to show that deceased's earnings would have been in excess of $30.00 per week on this job.

Evidence tends to show that deceased was an employee and not an independent contractor; that instead of deceased being an independent subcontractor he was an employee doing piece work at $1.15 per foot laying brick to build a manhole; that if deceased were a sub-contractor the principal-contractor had not required said deceased to provide compensation insurance for his helper and employee, as provided for in Section 19.

There is sufficient competent evidence to show that employer's representatives had proper notice of injury. Notice was verbal.

There was no evidence offered to show that interests of defendants were prejudiced by lack of notice of injury.

That a widow and eight children under 18 years of age were dependent upon deceased.

Upon the evidence in this case, the Commission makes the following

Findings of Fact

1. That defendant, Elliott Building Company, has accepted the Compensation Act and United States Casualty Company is its carrier.

2. That deceased, W. R. Logan, was an employee of Elliott Building Company, and not an independent contractor, and therefore subject to the Act.

3. That deceased *did not* sustain an injury by accident on July 25, 1929, while employed by defendant, as provided for in Section 2 (f).

4. That defendant-carrier did receive sufficient notice of injury.

5. That interests of defendant were not prejudiced by irregularity of notice.

6. That a widow and eight children under 18 years of age are dependent upon deceased.

7. That average weekly wage was in excess of $30.00 per week.

8. That the medical bills have not been paid.

Upon the foregoing findings of fact are based the following

Conclusions of Law

In this class of cases, where compensation is claimed on the ground that a preëxisting disease has been aggravated by injury resulting from an accident arising out of and in the course of the employment, to justify an award the evidence must be clear and satisfactory, both as to the fact of the accident and also in relation to the scientific or medical question of aggravation of the existing disease or infirmity. Clear and satisfactory evidence is evidence which convinces the mind and conscience of the person or body hearing the case of the truth of the contention. If it fails to convince the trier that the fact result claimed really existed or happened, then a finding cannot be made to that effect. In other words, the party alleging such fact or result has failed to discharge the burden of proof. It is not enough that evidence has been offered which tends to prove the fact or result. It is not proved until the trier is convinced that the allegation of fact or effect actually exists.

In the above styled case deceased was pushing a mortar box out of a ditch while his son was pulling. The deceased was not hit with anything, and it is common knowledge that there is almost no strain on the stomach muscles while in a pushing position as compared with pulling, and then, too, the box weighed but 175 pounds. For the reasons set forth above, it is directed that an award be made denying compensation and dismissing the case. Each party will pay its own cost in this hearing.

[Docket No. 6]

TOM WILKINSON, Plaintiff, v. MARION VENEER & PANEL COMPANY, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed November 22, 1929

Bodily Disfigurement.—After disfigurement of hands and neck become fixed and permanent and will be repulsive and affect reëmployment Commissioner finds $250.00 fair compensation.

Hearing before Matt H. Allen, Chairman, at Marion, McDowell County, N. C., on November 7, 1929.

Plaintiff appeared in person.

Defendants represented by *Mr. L. B. Carpenter*, of the Maryland Casualty Company, Asheville, N. C.

Opinion by ALLEN, Chairman.

Statement of the Case

This was a claim from McDowell County for injury sustained from burns received while firing a furnace in the mill of the Marion Veneer & Panel Company.

The claim was originally heard before Allen, Chairman, on September 3, 1929, and an award issued allowing the claimant compensation for nine weeks at the rate of $9.00 per week, together with all medical and surgical services. At that time the Commissioner was unable to determine the extent of the facial or bodily disfigurement and continued the hearing for further orders.

On October 25, 1929, the Commission, of its own motion, set the cause for further hearing on November 7, 1929.

The plaintiff appeared in person and was examined by the Commissioner.

Dr. J. F. Miller testified that in his opinion there would always be a discoloration on the hands of the plaintiff and that the large scar on the front of the neck at the point where the collar buttons in front was a permanent disfigurement and in his opinion would interfere with the wearing of a collar, and that the buttoning of a collar would always have a tendency to irritate the scar.

Upon the foregoing testimony and the examination of the claimant by the Commissioner the Commissioner finds as a fact that the disfigurement of the hands and neck of the claimant are permanent and that they will tend to make him repulsive to other people and that they will affect his re-employment if he shall seek employment from any person other than his prsent employer. The Commissioner further finds that $250.00 is a reasonable and fair compensation for the disfigurement. It is thereupon ordered and adjudged that an award issue providing for the payment to the claimant by the defendants the sum of $10.00 per week for a period of twenty-five weeks as compensation for his bodily disfigurement.

[Docket No. 46]

JAMES McNEELEY, Plaintiff, v. MORGANTON FURNITURE COMPANY, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed November 22, 1929

DISABILITY.—Failure to prove any loss of use, claim dismissed except for actual temporary total disability.

Hearing at Morganton, Burke County, N. C., November 7, 1929, before MATT H. ALLEN, Chairman.

Plaintiff appeared in person and in his own behalf.

Defendants represented by *Mr. L. B. Carpenter*, of the Maryland Casualty Company, of Asheville, N. C.

Opinion by ALLEN, Chairman.

Statement of the Case

It was admitted in open court that there was an accident on September 10, 1929, and that the plaintiff returned to work on September 23, 1929; that the employee was in the regular employ of the Morganton Furniture Company at the time of the injury; that the accident arose out of and in the course of his employment. There is no claim of default in the notice of this accident and of this hearing. The only question at issue is whether or not the claimant sustained any permanent loss of use of middle finger on the left hand as a result of the accident.

The plaintiff testified that at the time he requested a hearing the finger was stiff and he expected the stiffness to continue permanently; that since the request for a hearing the stiffness had disapepared, and that he now had the normal use of the finger.

Dr. J. J. Kirksey testified that the finger was apparently in good condition with no stiffness, and that in his opinion there was no loss of use of the finger.

The accident occurred on September 10, 1929, and claimant returned to work on September 23, 1929, thirteen days thereafter. The claimant at the time of the injury was earning $2.40 per day or $14.40 per week; deducting the first seven days in accordance with Section 28 of the Workmen's Compensation Act he would be entitled to receive compensation for six-sevenths of one week, which would amount to $7.38.

It appears that all medical and hospital bills have been paid and it is thereupon ordered and adjudged that an award issue providing for the payment to the plaintiff by the defendants the sum of $7.38.

It appears from the evidence that the defendant carrier had tendered to the plaintiff the sum of $7.20 which had been refused upon the grounds that the claimant contended that he was entitled to compensation for permanent injury. The plaintiff will, therefore, pay the cost of this hearing.

[Docket No. 86]

HARVEY STALEY, Employee, Plaintiff, v. SANDHILLS FURNITURE COMPANY, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed November 23, 1929

HERNIA.—Failure to meet requirements of Section 2 (r) burden of proof being upon plaintiff, claim denied. Dilated external ring is not a hernia as contemplated by Act.

Hearing before J. DEWEY DORSETT, Commissioner, at Carthage, Moore County, N. C., November 21, 1929.

Plaintiff appeared in person.

Defendant insurance carrier represented by *Mr. J. H. Naylor*, of Charlotte, N. C.

Opinion by DORSETT, Commissioner.

Statement of the Case

Harvey Staley is claiming compensation, the cost of an operation, and hospital and medical bills because of an accidental injury that he sustained, or alleges that he sustained, on July 30, 1929. His contention is that the injury resulted in a hernia; that he was operated upon and the doctor performing the operation found a hernia; and that under Section 2 (r) of the Compensation Law, he is entitled to recover the cost of the operation, any hospital and medical bills, as well as compensation for time lost.

The insurance carrier, in this case the Maryland Casualty Company, is denying liability on its part and on the part of the employer, and it is the contention of the defendants that the requirements of Section 2 (r) have not been met, and for further defense it is suggested that the plaintiff has violated Section 22 of the Act in that he failed to notify the employer of the accident within the thirty day period as set out by that Section. The accident occurred on July 30, and the employer and the insurance carrier had no knowledge of the said accident until some time shortly after September 11. On September 11, this claimant was operated upon, and the first notice of the alleged accident and the operation came to the employer from a hospital in Monroe, N. C. The case was first reported to this Commission on September 23, 1929, the report being signed by the employer. The attending physician's first report of this accident is dated September 23, and discloses the fact that the first treatment was rendered the claimant on September 10, and that he was operated upon on September 11, more than thirty days after the occurrence of he accident.

The claimant testifies that he injured himself on July 30, while regularly employed by the Sandhills Furniture Company; that the injury was caused in this manner: He was a cabinet maker and it was necessary that certain beds be handled by him, and in raising one of these beds out of a clamp about the height of a four foot table, he strained himself, that in raising these beds it was necessary to put one end of the bed against his stomach, and while doing this, and in the strain necessary to raise the bed, he felt a burning pain in his side; "that it felt like something had torn loose in there"; that it came on him suddenly and pained him a great deal and continued to pain him until he went to the hospital and was operated upon.

The evidence further discloses that this claimant continued to work without losing any time to amount to anything until the first of September; that he lost all of September and October, and from the testimony of Dr. James, was able to return to work on November first. The claimant testified, however, that during all this time he was suffering continually, and that the reason he did not report the same to his employer was due to the fact that for a number of years he had suffered from what he thought was appendicitis, and he was under the impression that maybe his suffering was due to the condition of his appendix, although he testified that the pain he suffered at the time of the accident was different from the suffering he had previously experienced. He testified that he went to Dr. James on the 10th of September, and related to the doctor the history of his case, and that the doctor told him he had a hernia and advised an operation, and the operation disclosed a hernia.

Dr. A. W. James states that he found that Mr. Staley, on his right side, had a relaxed external inguinal ring which would readily admit the tip of a finger; and the ring on canal was open to such an extent that he could get his finger well up in there; and upon having his patient cough or strain, there was a marked impulse that could be felt in the inguinal canal; and upon this he advised an operation, and he himself performed the operation, and the operation disclosed the following condition: "External ring markedly dilated and the canal was rather flaccid; no hernia sack was found. The operation consisted of a herniorrhaphy, which is a repairing of the inguinal canal and the suturing of the fibres of the external ring." The doctor further testified that the young man came to him complaining of an accident that occurred on July 30, and his findings from his examination prior to the operation, and after he operated, were entirely compatible with the history he gave. He found no evidence of appendicitis, but no X-ray was made for the diagnosis of chronic appendicitis; and he did not have any signs of acute appendicitis at the time of the examination.

On cross-examination the doctor testified that it was possible that this claimant could have been suffering from appendicitis instead of an incomplete hernia, but that it does not coincide with the history he gave. That on his first examination the plaintiff related a history of hernia very definitely, and described pain such as was found objectively; that he discovered pain as described along the course of the inguinal canal, and the discomfort caused upon examination fitted in with the history of the case as given to him; that the history of appendicitis, on the contrary, is different, and more a history of general dyspepsia or general upset with a nagging ache rather than acute pain.

It is admitted that the parties to this case are bound by the provisions of the North Carolina Workmen's Compensation Act; that the average weekly wage of the plaintiff amounted to $13.75; that the plaintiff was regularly employed by the Sandhills Furniture Company; and that on July 30, this plaintiff was on the job. From all the evidence the Commission makes the following

Findings of Fact

1. The parties, plaintiff and defendant, are bound by the provisions of the North Carolina Compensation Law; the Maryland Casualty Company is the insurance carrier; and the average weekly wage is $13.75.

2. The requirements of Section 2 (r) of the Compensation Act have not been met by the claimant; the burden being on him to show to the satisfaction of the Commission, (first) that there was an injury resulting in hernia, or rupture; (second) that the hernia or rupture appeared suddenly; (third) that it was accompanied by pain; (fourth) that the hernia or rupture immediately followed the accident; and (fifth) that the hernia or rupture did not exist prior to the accident for which compensation is claimed.

Conclusions of Law

According to medical information, many people have enlarged and relaxed inguinal rings, with some impulse on coughing. By some this is not considered a definite hernia, but a predisposition towards hernia; furthermore, a sack can practically always be found at a hernia operation. This man in all likelihood has had the enlarged and relaxed ring for a long time without knowing it. For a number of years he has complained of pain in his right side which could have been due to this hernia of long standing, or some other trouble which he still has, and there is no proof that this enlarged ring developed suddenly, or that there was no enlarged ring before the accident.

Considering the fact that the claimant continued to work following the occurrence (it is in evidence that he worked thirty days following the occurrence of the alleged accident) of the accident, and since the evidence discloses the fact that the claimant has suffered for a number of years from what he thought was appendicitis, and the other difficulties from a medical standpoint, the Commissioner finds it impossible to hold that it has been established that the requirements of Section 2 (r) have been met.

In *Yancey v. Boylan Pearce Company* this Commission has held that what the Commission deals with is "hernia" and its five requirements. In this case it was held that a hernia is "a protrusion of a viscous through an abnormal opening in the wall of the containing cavity." In *Curley v. Atlantic Bitulithic Co.*, this Commission held that, "Hernia will only be considered accidental under the North Carolina Workmen's Compensation Act where there is real traumatic hernia resulting from the application of force directly to the abdominal wall, either puncturing or tearing the wall. All other cases will be considered as either congenital or of slow development, being a disease rather than an accidental injury, unless conclusive proof is offered that the hernia was immediately caused by sudden effort or strain."

The medical evidence in this case is that the operation disclosed that the external ring was markedly dilated, the canal was flaccid, and no hernia sack was found. The operation consisted of a repairing of the inguinal canal, and the suturing of the fibres of the external ring.

This Commission is of the opinion that a dilated external ring is not a hernia as contemplated by the North Carolina Workmen's Compensation Law. It is ordered that an award be issued in this case denying compensation and medical and hospital fees; each side will pay its own costs.

[Docket No. 75]

R. C. COFFEY, Employee, Plaintiff, v. CANNON MILLS COMPANY, Employer, Defendant

Filed November 22, 1929

Disease.—Boils. Plaintiff failed to prove occurrence of an accident resulting in boils. Claim denied.

ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT.—Upon failure to prove that injury (boils) result of accident arising out of and in the course of employment, claim denied.

Hearing before J. DEWEY DORSETT, Commissioner, at Concord, Cabarrus County, N. C., November 8, 1929.

Plaintiff appeared in person.
Defendant represented by *Mr. W. H. Beckerdite.*

Opinion by DORSETT, Commissioner.

Statement of the Case

This is a claim for compensation for time lost and for medical attention by this plaintiff, for an accident that is supposed to have happened on September 30, 1929, while this claimant was regularly employed by the Cannon Mills of Kannapolis, N. C. If any compensation is due, the amount is small; however, the defendant is denying liability on the grounds that the infection following the alleged accident was not caused by an injury received in the course of his employment.

The claimant testifies that he hurt his hand, having his finger blistered in hanging weights on "an intermediate frame." He further states that there was a boil under the blister. He contends that he reported his accident to the section man on the morning following the occurrence of it. He gave to this section man as his reason for wanting to quit work, that he had a boil on his hand. This testimony is corroborated by the section man to whom he reported. The written notice as required by the Act, wherein an employee is supposed to notify his employer within thirty days of the occurrence of an accident, is dated on November 2, 1929, more than thirty days after the alleged accident is supposed to have happened. This claimant did not report to the mill physician, as required by the rules of the employer, until more than thirty days after the occurrence of the accident. The first time that this employer was informed by the claimant that he was hurt while in the course of his employment, was more than thirty days after the occurrence of the accident. The claimant contends the infection that followed and is the cause of his present disability, was caused by "getting some grass or something in the boil or blister"; but, it is in evidence that this claimant did not work more than one day after the occurrence of the accident, and when he left the employer's premises he left because he had a boil on his hand.

We have the testimony of Dr. B. E. Robinson, the only physician who was present at this hearing. Dr. Robinson is not able to say what caused the infection. He states that when he first saw the claimant, that the place on his hand looked more like a bruise than an outside infection.

From the evidence this Commission is of the opinion that the claimant has failed to prove the occurrence of an accident as required by the Compensation Law. Subsection (f), of Section 2 of the Act, plainly states that "injury" or "personal injury" shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident.

The case is therefore dismissed; each side will pay its own costs.

[Docket No. 50]

L. E. BOYKIN, Deceased, Employee, LARRY BOYKIN, SARAH BOYKIN, L. E. BOYKIN, JR., DOROTHY BOYKIN, Plaintiffs, v. HINNANT NASH COMPANY, Employer, AETNA LIFE INSURANCE COMPANY, Carrier, Defendants

Filed November 21, 1929

OUT OF AND IN COURSE OF EMPLOYMENT.—While testing out machine after hours of work, voluntarily relieving co-employees of duty with consent of employer's agent, deceased met with accident resulting death, held to arise out of and in course of employment.

FATAL CASES AND DEPENDENCY.—Death resulting from accident occurring after hours of work while performing services for employer and while relieving co-employees with consent of foreman is compensable. Minor Children conclusively presumed to be dependent; parents found to be wholly dependent. Compensation divided equally between wholly dependents.

Mr. J. L. Simmons, Attorney, representing the Plaintiff.

Mr. J. P. Bunn, Attorney, representing the Defendants.

Mr. W. B. McDonald, representing the Insurance Carrier.

It was admitted by both parties that L. E. Boykin was an employee of the Hinnant Nash Company; that his average weekly wage was about thirty-five dollars a week.

Opinion by WILSON, Commissioner.

Statement of the Case

L. E. Boykin, deceased, was regularly employed by Hinnant Nash Company of Rocky Mount; Aetna Life Insurance Company is the carrier for said Hinnant Nash Company; that said Boykin was receiving $35.00 per week for one year prior to an accident resulting in his death; that said accident occurred between ten and eleven o'clock p.m., September 9, 1929, on the highway between Rocky Mount and Nashville; that said accident resulting in the death of L. E. Boykin occurred after regular closing hours of garage of said Hinnant Company; the night of the accident was not said Boykin's regular night to work; that the employees of said garage would rotate as to their nights to remain late; that it was a custom of the employees to exchange with each other at night and thus make it convenient for them to attend amusements or transact any other personal matters on nights they were assigned to work; that these exchanges or accommodations were made with the full knowledge of the management of said garage; that said employees did not receive additional or extra pay for work out of hours, and it was more or less common practice to do work outside of regular hours for which said Hinnant Company would make their regular charges; it was testified that some of this extra or emergency work has been as late as one or two o'clock a.m., when a car was stalled; that on this particular night, September 9, 1929, C. L. Davidson, who had purchased a car from Hinnant Company on May 4, 1929, and a customer of said firm, brought his car to the garage just as the foreman, R. T. Hawkins, and Willie Wood, an employee on duty, were closing the doors; that T. G. Wood and L. E. Boykin, fellow employees, but not on duty, were present at the time of closing. The above named employees, except deceased Boykin, testified that Davidson wanted his car greased and the oil changed, and that said foreman spoke to all as a group and asked them to do the job. Willie Wood, who was on duty, and T. G. Wood and Boykin, in the presence of and with the knowledge of said foreman did this work. Hawkins, the foreman, later told Boykin to put water in the battery of Davidson's car.

T. G. Wood and Willie Wood, employees, and C. L. Davidson, the customer and coöccupant of car at the time of said accident, testified that when the car had been greased Davidson asked that his car be tuned up as he was going on a long trip early the next morning; and Davidson testified that his car being equipped with twin ignition it seemed like one set of spark plugs were not firing. T. G. Wood and Willie Wood testified that Boykin volunteered to do the tuning of the motor that the Wood brothers might see the serial motion picture that night inasmuch as the Wood brothers had often accommodated him. It was while said Boykin was on the trip to try-out and adjust the car that the accident occurred, Boykin sustaining personal injuries resulting in death. The evidence tends to show that on occasions cars under repair, or just repaired, are taken from the garage and onto the highway to be tested. An effort was made by the defendants to show that the trip was more for pleasure than business.

Said deceased plaintiff has two children, L. E. Boykin, Jr., and Dorothy Boykin, ages 11 and 13 respectively. His father and mother, Larry Boykin and Sarah Boykin, testified that they were wholly dependent upon their deceased son, L. E. Boykin.

Upon the evidence in the case the Commission makes the following

Findings of Fact

1. That deceased plaintiff, L. E. Boykin, and defendant employer, Hinnant Motor Company, have both accepted the terms of the Compensation Act, and Aetna Life Insurance Company is the carrier for defendant employer.

2. That deceased sustained personal injuries as a result of an accident about 11:00 o'clock p.m. September 9, 1929; said accidental injuries arose out of and in the course of the employment of said plaintiff; said injuries resulting in death.

3. That L. E. Boykin, Jr., age 11, and Dorothy Boykin, age 13, are children of the deceased; and that Larry Boykin, and Sarah Boykin, parents of said deceased, were wholly dependent upon the earnings of said deceased; that deceased Boykin was a widower.

4. That average weekly earnings of deceased were $35.00.

5. That medical, surgical and hospital bills have not been paid.

Upon the foregoing findings of fact the Commissioner bases the following

Conclusions of Law

According to the evidence submitted, deceased was performing a service "reasonably related to service, and was done in good faith and in furtherance of employer's business"; (*Ex parte Terry*, 100 So., 768, 769, 211 Ala., 418;

In re McCrary, 192 N.W., 237, 239, 109 Neb., 796. See *Milne v. Sanders,* 228 S.W., 702, 707, 143 Tenn., 602).

Where employer's manager expressly approved and assented to employee's habit of soliciting sales of merchandise before reporting for duty at 8:00 a.m., injury sustained by her while soliciting sales before reporting for work held to "arise out of and in course of employment," *Real Silk Hosiery Mills v. Industrial Accident Commission of California* (Cal.), 260 Pac., 807. (Cal.), 260 Pac., 807.

In this case the management knew that the employees often exchanged hours of work, especially at night, and it was known that at times employees would take a car out of the garage to try it out at various speeds.

1. Under Section 39 of the Compensation Act, the two children are conclusively presumed to be dependent.

2. Under Section 39 and according to the evidence and findings in the case the parents of said deceased are wholly dependent.

3. Under Section 38, burial expenses not to exceed $200.00 are to be paid, and under said Section the wholly dependents are to be paid $4.50 per week each; and the total weekly compensation plus burial expenses shall not exceed $6,000.00, as provided for in Section 41.

4. Said compensation to dependents to be paid every four weeks.

5. That compensation payable to L. E. Boykin, Jr., and Dorothy Boykin, children of deceased, shall be paid to the Clerk of Superior Court of Edgecombe County, to be held by said Clerk for the proper use and benefit of said minor children.

6. Under Section 25, all necessary medical, surgical and hospital bills shall be paid.

[Docket No. 28]

HARVIE N. MORGAN, Plaintiff, v. TOWN OF SMITHFIELD, Employer, and AETNA LIFE INSURANCE COMPANY, Defendants

Filed November 21, 1929

Review.—Full Commission finds award for facial disfigurement excessive, reducing same from $750.00 to $500.00.

Facial Disfigurement.—Award of $750.00 reduced to $500.00 upon review by Full Commission.

Review before the Full Commission, at Raleigh, N. C., November 19, 1929.

Claimant was present; he was not represented by an attorney.
Hon. Kenneth Royall represented the defendants.

Opinion for Full Commission by Dorsett, Commissioner.

Review was requested by the defendant insurance carrier in this case, following a hearing before Commissioner Wilson in Smithfield, N. C., on October 21, 1929. The Hearing Commissioner as a result of the above stated hearing awarded the claimant compensation in the amount of $750.00, this award was in payment for serious head disfigurement as provided for in Section 31, subsection (t), of the North Carolina Workmen's Compensation Law.

The insurance carrier requested the Full Commission to pass on the case to the end of determining if the award of $750.00 was excessive, said carrier contending that the award was "grossly excessive."

The Full Commission has reviewed the testimony and the opinion of the Hearing Commissioner in this case, as well as examined the claimant himself, and is of the opinion that the award is excessive, believing that the sum of $500.00 would be a liberal award in this case and would abundantly compensate the claimant for the disfigurement sustained. The award is therefore ordered reduced in the amount of $250.00. With this single exception, the opinion and award of Commissioner Wilson is affirmed and is adopted as the opinion of the Full Commission. The question is that of determining an equitable and reasonable compensation and the Full Commission is of the opinion that they are justified in amending the award to the extent of the $250.00 reduction.

An award will therefore be issued in accordance with the above opinion of the Full Commission.

Award

An award shall be made in accordance with the above Conclusions of Law, and the defendants shall pay the cost of this hearing.

[Docket No. 80]

ROSABELL SMITH, Deceased, Employee, Plaintiff, v. COLLINS-AIKMAN CORPORATION, Employer, and THE TRAVELERS INSURANCE COMPANY, Carrier, Defendants

Filed November 19, 1929

Fatal Cases and Dependency.—Where conclusive presumption of dependency is proven Section 38 applies and Section 29 not applicable, therefore personal representative not entitled to compensation under authority *Smith v. Power Co.*, Docket No. 19.

Hearing before J. Dewey Dorsett, Commissioner, at Roxboro, Person County, N. C., November 18, 1929.

Plaintiff represented by *J. A. Bailey*, Attorney.

Defendant insurance carrier represented by *Mr. John W. Cabell*, Adjuster for the Travelers Insurance Company.

Opinion by Dorsett, Commissioner.

Upon hearing in the above-styled case the witnesses were duly sworn and testimony taken as follows:

Mr. Dorsett: It is admitted by Mr. John Cabell representing the Travelers Insurance Company and the employer, that the deceased met with an accident on August 12, 1929, at about 8:00 p.m., and that the accident arose out of and in the course of her employment and resulted in her death.

It is agreed by the plaintiffs and the defendants that the average weekly wages of the deceased at the time of her death amounted to $12.50.

It is admitted that W. T. Smith, her husband, and three small children, ages six, four, and two, Dorothy Louise Smith, James Thomas Smith, and Agnes Elizabeth Smith, are the dependents.

Q. Mr. Smith, you have not qualified as personal representative or administrator of the estate of Mrs. Smith, have you?

A. No, sir.

As I understand it from the record, gentlemen, the Travelers Insurance Company, the insurance carrier for the Collins-Aikman Corporation, has offered to pay compensation to the dependents of the deceased at the rate of sixty per cent of the average weekly wage for a period of three hundred and fifty weeks, to pay burial expenses not to exceed $200.00, and to pay all medical, hospital, and doctors' costs that may be due. From the record here it seems that an agreement could not be had due to the fact that the dependents of the deceased seemed to be under the impression that they are entitled to recover $6,000, the maximum amount allowed under the North Carolina Workmen's Compensation Law, and are relying on Section 29, and particularly the last sentence, and that the disagreement over the amount of compensation due is the basis or reason for this hearing. Is that not correct?

Mr. Bailey: Yes, sir.

Mr. Cabell: Yes, sir.

Mr. Dorsett: Counsel for the dependents or plaintiffs in this case, upon admissions made by the defendants, is asking the Industrial Commission to make an award against the defendants to pay compensation under Section 29 calling for a payment of $6,000.00 as provided in the last sentence of that Section. The last sentence reads, "In case of death, the total sum paid shall be $6,000.00, less any amount that may have been paid as partial compensation during the period of disability, payable in one sum to the personal representative of the deceased." Counsel for the plaintiffs construes the Compensation Law to mean that in the event of death the law provides for a payment of $6,000.00. With this the plaintiffs rest.

Mr. Cabell, representative for the insurance carrier and the employer, contends that Section 29 in the instant case is not applicable, and offers to pay compensation under Section 38 to the dependents of the deceased, Rosabell Smith, and is willing to enter into an agreement to pay compensation on the basis of sixty per cent of the average weekly wages, for a period of three hundred and fifty weeks, and burial expenses not to exceed $200.00, and it is of record that the insurance carrier by check under date of August 8, 1929, offered compensation on that basis. This check and the agreement were both returned to the insurance carrier for the reason that the dependents were not willing to sign an agreement that called for any payments under $6,000.00, as provided for in Section 29. With this statement the defendants rest.

Statement of the Case

Rosabell Smith was regularly employed by the Collins-Aikman Corporation on August 12, 1929. While in the course of her employment and by an accident that arose out of it, she received an injury that resulted in instant death. Her average weekly wage at the time of the accident was $12.50. All of the parties to this case are bound by the provisions of the North Carolina Workmen's Compensation Act of 1929. The Travelers Insurance Company is the insurance carrier for the defendant employer, and has intervened as a party defendant in this proceeding. All of the facts above set out were admitted by the parties interested, through their representatives. The deceased leaves a husband, W. T. Smith, and three small children, that, under the Law, are conclusively presumed to be wholly dependent for support upon the deceased; Section 39 of the Compensation Act.

The insurance carrier has offered to pay the dependents compensation at the rate of sixty per cent of the average weekly wage for a period of three hundred and fifty weeks, funeral expenses not to exceed $200.00, and any medical bills that are due, as required by Section 38 of the Compensation Act. The dependents refuse to accept the offer as made by the insurance carrier, because they say they are entitled under the Law to receive $6,000.00, or the maximum amount provided by the said Act. The dependents requested this hearing. There was no evidence introduced because all of the facts concerning the accident and death, and liability of the defendants, were admitted by the defendants. Counsel for the dependents in the course of this hearing requested payment of compensation as provided for in the last sentence of Section 29. That Section provides: "Where the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such total disability, a weekly compensation equal to 60 per centum of his average weekly wages, but not more than eighteen dollars, nor less than seven dollars, a week; and in no case shall the period covered by such compensation be greater than four hundred weeks, nor shall the total amount of all compensation exceed six thousand dollars. In case of death the total sum paid shall be six thousand dollars, less any amount that may have been paid as partial compensation during the period of disability, payable in one sum to the personal representative of deceased." After making this statement the plaintiffs rest.

The defendants contend that their offer to pay compensation is in accordance with the Law, and rest their case.

From all this this Commission makes the following

Findings of Fact

1. The parties, plaintiffs and defendants, are bound by the provisions of the North Carolina Workmen's Compensation Law of 1929.

2. The deceased was accidentally killed on August 12, 1929, while regularly employed by the defendant employer. The accident resulting in death arose out of and in the course of her employment. At the time of the accident she was earning $12.50 per week.

3. W. T. Smith, husband, and three small children, Dorothy Louise, James Thomas, and Agnes Elizabeth Smith, ages six, four, and two, respectively, are under the Law conclusively presumed to be wholly dependent for support upon the deceased, and are therefore entitled to receive compensation provided by the Law.

Conclusions of Law

In the case of Junius Herbert Smith, Jr., deceased, and others, plaintiffs, against the Carolina Power & Light Company, defendants, Docket No. 19, this Commission has held that where the deceased leaves dependents that compensation will be awarded under Section 38 of the North Carolina Workmen's Compensation Law.

In the instant case, dependency is conclusively presumed to exist, and for that reason, Section 29, relied upon by the dependents in asking for the maximum amount of $6,000.00, does not apply, because the first section of Section 29 has to do with compensation payable to an injured party when incapacity for work is total. In the last sentence of that Section, the part that the dependents are relying upon for the maximum award deals with compensation that is payable to a personal representative. In the instant case there is no personal representative, and if there were one he would not be entitled to any amount because in the instant case dependency is conclusively presumed to exist. An award will therefore be made as provided by Section 38.

Award

The insurance carrier will pay compensation to the dependents at the rate of $7.50 per week, for a period of three hundred and fifty weeks. In addition to this, the insurance carrier will pay all funeral expenses, not to exceed $200.00, and pay any medical bills that may be due.

The said award shall be paid every four weeks to the said four dependents, share and share alike. It is ordered, however, that the shares to which the minor dependents are entitled shall be paid into the office of the Clerk of the Superior Court of Person County, North Carolina, to be held by the clerk of said court for the use and benefit of said minor dependents. Each side will bear its own costs of this hearing.

From the above findings of fact, conclusions of law, and award, the counsel for the plaintiffs gives notice of appeal. This case will therefore be set for review by the Full Commission in due time, and the parties concerned will be duly notified.

[Docket No. 54]

JIM TANTNEY, Plaintiff, v. KITCHEN LUMBER COMPANY, Employer, and U. S. FIDELITY AND GUARANTY COMPANY, Carrier, Defendants

Filed November 27, 1929

LUMP SUM AWARD.—Where to best interest of employee and no hardship upon employer award will be made for sufficient amount only to return employee to his native state.

Hearing before MATT H. ALLEN, Chairman, at Asheville, Buncombe County, N. C., on November 6, 1929, at 10 a.m.

Plaintiff represented by *Mr. W. B. Snow*, Attorney, Asheville, N. C.

Defendants represented by *Mr. F. M. Tongue*, Adjuster for the U. S. Fidelity and Guaranty Company, Law Building, Asheville, North Carolina.

Opinion by ALLEN, Chairman.

Statement of the Case

This was a claim from Swain County heard by agreement between plaintiff and defendants in Buncombe County on November 6, 1929.

It was admitted that plaintiff was in the employ of defendant, Kitchen Lumber Company, at the time of accident; that the accident arose out of and in the course of the employment; that the average weekly wage of plaintiff was $21.00 per week; and that both plaintiff and defendant are subject to the Workmen's Compensation Act, leaving for determination one question, viz: what percentage of loss of use of right foot has claimant sustained?

Plaintiff testified that he was fifty-six years of age; that he was born in New Hampshire and moved to Michigan when a boy; that he had worked in saw mills all his life; that he served with the U. S. Marines during the world war and fought in the battles of Chateau Thierry, Marne, Metz and Argonne; that he was injured on July 22 by a log rolling against the heel of his foot fracturing several bones and rendering him totally disabled for a period of four or five weeks; that he was sent to a hospital in Knoxville, Tenn., where he was given electric treatments for several weeks and then sent back to Tapoco and then sent by his employer to Asheville, N. C., for further examination; that he continues to suffer pain in the foot; that he cannot wear a shoe, and is compelled to wear a soft slipper; that he could only walk on the side of his foot; and that use of the foot in walking causes a swelling; that he is unable to do any work requiring use of his foot.

Dr. F. W. Griffith testified that he examined and X-rayed claimant's foot on or about October 22, that he found the metatarsal bones had been fractured and the tarsal bones crushed and fractured and in a fused condition; that in his opinion the claimant was disabled in the foot about thirty-three and one-third per cent.

Dr. W. B. Meacham testified that he had examined plaintiff's injury and that in his opinion the plaintiff has sustained a seventy per cent permanent disability in his right foot; that at the present time he was totally incapacitated.

Upon the conclusion of the evidence F. M. Tongue, representing the defendants and W. B. Snow representing the plaintiff, in the presence of the plaintiff and with his knowledge, approval and consent stated to the Commissioner that it had been agreed subject to the approval of the Commissioner that the plaintiff had sustained a seventy per cent loss of use of the right foot, and that award should so issue providing for the payment to the plaintiff of $12.60 per week for a period of eighty-seven and one-half weeks. And thereupon the Commissioner approved the agreement and directed the entry that award issue in accordance with the agreement.

The plaintiff in person and through his counsel filed motion for the allowance of a lump sum award, assigning as his reason therefor that claimant desired to return to the state of Michigan where his only relatives reside; that he had no friends, relatives or even acquaintances in North Carolina except the acquaintances at Tapoco; that there was no employment to be had at Tapoco except with the lumber company; and that on account of his physical condition he could not undertake such strenuous work; that if awarded a lump sum settlement he could return to Michigan and, with the assistance of his brother, invest the money in a business such as lunch counter or cigar stand and live on income from the business.

The Commissioner is of the opinion that claimant's plans are too indefinite to justify consideration of a lump sum award except so much as will insure his transportation to Michigan, and the Commissioner, therefore, orders that award issue providing for payment to plaintiff for temporary total disability from July 22, 1929, to November 5, 1929, and from November 5, 1929, the defendants will pay to plaintiff compensation at the rate of $12.60 per week, payable weekly, for eighty-seven and one-half weeks for seventy per cent loss of use of right foot.

The Commissioner finds that it will be to the best interest of claimant and will not work a hardship upon defendants, that the last twenty-two weekly payments be commuted. It is therefore ordered that defendants pay to plaintiff at once the sum of $252.14, the commutable value of twenty-two weekly payments.

It is further ordered that defendants pay all medical and hospital bills.

The attorney's fee of W. B. Snow, Attorney, has been approved in the amount of $75.00.

Costs of the hearing will be paid by defendants.

[Docket No. 65]

MRS. WILLOW BALLARD, Employee, Plaintiff, v. CANNON MILLS COMPANY, Self-insurer, Defendant

Filed November 16, 1929

Disease.—Preëxisting syphilitic condition aggravated and accelerated by accidental injury is compensable.

Construction of Act.—Act must be liberally constructed.

Hearing before J. Dewey Dorsett, Commissioner, at Concord, Cabarrus County, N. C., November 8, 1929.

Plaintiff represented by *Armfield, Sherrin* and *Barnhardt*, Attorneys; Mr. Sherrin was present.

Defendants represented by *Mr. W. H. Beckerdite.*

Opinion by Dorsett, Commissioner.

Statement of the Case

Mrs. Willow Ballard was regularly employed by the Cannon Mills Company at an average weekly wage of $15.13. During her employment she received a slight injury on the left ankle by having a box pushed against it. The box was being pushed by a fellow employee by the name of Miss Omia

Newton. The injury complained of occurred on the 19th of September, 1929.

From the testimony of two physicians, as well as other witnesses, the slight ankle injury would not have been serious had this claimant not been diseased. The uncontradicted evidence is that this claimant was injured on the ankle, the injury arising out of and in the course of her employment; and it is uncontradicted that this claimant at the time of the injury was suffering a bad case of syphilis. When Mrs. Ballard first went to see a doctor, she went complaining of her injured ankle and the back of her leg, informing the doctor that "she had been hurt by a box running over it at the Cannon Mills."

Dr. Misenheimer testified that the place on the ankle was small; that it looked more like a bruise than a skinned place, and the leg was a little red. The doctor discovered trouble on the leg just below the knee that appeared more serious than the ankle injury. A sore of long standing was found just below the knee of the same leg with the ankle injury. The sore had been there some time, and would not heal up. He treated this claimant for the ulcer on the front of her leg; a Wassermann test was given and a positive reaction received. The first examination and treatment was on September 22; the next time he saw the patient was on October 4. At this time the foot was swelled up around the ankle and the doctor says, "It looked like a deep abscess"; and he was of the opinion that the injury to the ankle contributed to the present disability. The bruise was the exciting cause of the trouble; but the real cause, in the opinion of both physicians, is the condition disclosed by the Wassermann test. The syphilitic condition is the cause of the failure to heal.

Dr. P. R. MacFayden testifies that he was called to see Mrs. Ballard just after she was admitted to the hospital; that he found her with an abscess on the back of her left ankle, extending up the foot and half-way up the lower leg; the skin was becoming mottled on the front of the foot—dorsally. The abscess opened freely and drained freely, but the tendons on the front of the foot were beginning to slough at that time or a few days after that. She lost all the tissues on the top of the foot, the tendons along with it, except the tendons on the great toe. "She was in bad shape generally." "She was a bad subject and before I could get her under any syphilitic treatment, why, the whole top of her foot sloughed off, but since she has come under the influence of this treatment she has begun to improve." Dr. MacFayden was of the opinion that she will always limp in that foot. He stated that the ulcer on the front of the leg healed over from the treatment.

Q. Doctor, in a person that is subject to—in a person that has syphilis in a dormant condition, and received an injury, would that tend to make that condition active and break out?

A. Tissue in a syphilitic will never heal if there is any injury.

Q. If a person has syphilis in a dormant condition, that condition will continue to exist for a number of years unless some injury is received to make it break out, will it not?

A. It might, and again it might not. You never know when it's going to break loose on you.

Q. But the place where it did break loose was down where the injury was received, wasn't it?

A. I don't know a thing about the injury. There was no skin or anything else; there was an ulcer or abscess.

Q. Doctor, in a person apparently in normal condition—that is, doing daily work, and who had been doing that work for a number of years—who had a dormant case of syphilis—if they were to receive an injury that would skin the ankle or foot, in your opinion would that injury make the syphilis active and result in an injury to the foot and the sloughing off of the tendons?

A. Yes, sir; an injury to the tissue produces a fertile soil. The tissue might be able to function when it is in a normal condition; it's hardly dormant, but symptomless; that's what we say of syphilis. You have a damaged tissue and a lowered vitality of the tissue in that point, and you would get a flaring up or activity of this syphilis germ focused in that particular point; then it seems to operate so you just don't get healing—you just don't get healing until you get it under the influence of specific treatment.

Q. As I understand it, any injury such as described—a bruise or skinned place—might aggravate a syphilitic condition and cause this disability; do you have an opinion satisfactory to yourself as to whether or not any permanent injury would have resulted, without the syphilitic condition, from such an injury?

A. I don't think so. It would have been different if it had been septic—that is, due to ordinary, pus-producing germs; an abscess or ulcer would have showed up in a few days. It was the 4th when she called and the 19th when she was hurt.

Q. Except for the syphilitic condition there would have probably been no disability?

A. Probably not in this case.

Dr. MacFayden is of the opinion that there will be a loss of use of from 15 per cent to 20 per cent in this foot if the best results are had; and if the syphilitic condition had not been present there would have been no disability.

Q. (By Mr. Dorsett): Dr. MacFayden, assuming that the ankle or heel was in perfectly good shape at one time, to what extent would an injury to that heel or ankle, received by a box being pushed against it—to what extent would that aggravate or contribute to the present condition of the foot as you found it?

A. It would give an exciting cause for further inflammation, and would cause a reduction of the vitality of the tissue even though it was a small spot; it might be just a tiny bruise. It lowers the vitality and gives a chance for the activity of the infection; it makes very little difference whether the original injury was a crushed foot or just a small bruise; those things reduce the vitality of the tissue and furnish an exciting cause, and a focusing point.

Q. (By Mr. Beckerdite): As I understand it a slight injury would cause this (speaking of the present disability)—a skinned place or a bruise?

A. It's not necessary to break the skin at all.

Q. Assuming that there was no syphilitic condition in all probability it wouldn't amount to more than a temporary disability?

A. It usually wouldn't.

Q. But coupled with a syphilitic condition?

A. It practically always causes trouble.

Counsel for the claimant asked Dr. MacFayden what was the cause of the present disability—the ulcer, or the injury to the foot. The doctor replied that it was a combination of the two probably; the injury there is the point of the least resistance—or lowered resistance.

This case presents the question of the aggravation of a preëxisting condition or disease. The North Carolina Workmen's Compensation Law says that "injury" and "personal injury" shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident. The question that confronts us in the instant case is: Did the accident to the plaintiff's ankle contribute in any way to her disability; and does the present disability result naturally and unavoidably from the accident?

The defendant admits there was an accident and that the accident arose out of and in the course of the plaintiff's employment, and is asking this Commission to determine if the accident contributed to the claimant's present disability; if it aggravated the preëxisting condition, thus causing the claimant's present disability. From all of the evidence, and after conculting medical men of ability, the Commission makes the following

Findings of Fact

1. The parties, plaintiff and defendant, are bound by the provisions of the North Carolina Workmen's Compensation Law of 1929.

2. The average weekly wage of the plaintiff at the time of the injury was $15.13.

3. That the immediate cause of the plaintiff's present disability is her syphilitic condition, but the injury sustained on the 19th of September, 1929, is a contributing cause of her disability, and that the ravages of this disease were intensified and the condition following the accident resulted therefrom; that the disease was accelerated by the accident, which was a direct contributing cause of her present disability, the same resulting naturally and unavoidably from the accident.

4. There is evidence that the plaintiff has suffered some loss of use of the left foot. This loss of use, if any, will be determined when the plaintiff is able to return to work and at a later hearing.

Conclusions of Law

The burden of showing that the condition of her left foot resulted naturally and unavoidably from the accident to her ankle on September 19, 1929, is on the plaintiff. Dr. Meisenheimer testified that the bruise on her ankle was the exciting cause of the trouble; that the syphilitic condition is the cause of the failure to heal; that in his opinion the injury to the ankle contributed to her present disability. Dr. MacFayden testified that the place where the disease broke loose was on the ankle where the injury was received; that where you have damaged tissues and a lowering of the vitality of the tissues at a certain point you get a flaring up and activity of this syphilitic germ focused at that particular point; that the injury to the ankle gave an exciting cause for further inflammation and reduces the vitality of the tissues in that particular place. "It lowers the vitality and gives a chance for the activity of the infection; it makes very little difference whether the injury was a crushed foot or just a small bruise. These things reduce the vitality of the tissues and furnish an exciting cause and a focusing point."

The defense made in this case brings before this Commission for the first time the question of whether or not compensation can be allowed under the North Carolina Workmen's Compensation Law for the acceleration and aggravation of a preëxisting disease which is caused by an accident sustained by an employee in the regular course of her employment. Our Courts have not been called upon to pass on the question that the instant case presents; our Compensation Law having recently been passed. We are therefore compelled to look elsewhere for the law. The cases are numerous in which the question here involved has arisen in other jurisdictions; the decisions, however, are not entirely harmonious, but the weight of authority and the better reasoning sustains the position that injuries of this character are to be held as the result of accident, and are therefore compensable. In the instant case there is no doubt that the claimant was on the date of the injury suffering from a syphilitic condition that, in the opinion of one of the doctors, made her an extremely bad subject. This condition, however, was not such as to keep her from her work prior to the accident, she had attended to her usual duties in the mill; she was on the job when injured, and there was no evidence from the employer that she was not doing her work in a satisfactory manner. She was, however, as the evidence discloses, afflicted with this disease. The accident that she sustained tended to excite the activity of her heretofore dormant or symptomless malady, and by reason of a weakening of the tissues and powers of resistance, accelerated or aggravated the disease, causing her present disability.

Disease having no connection with an accident is not compensable. *Thompson v. Esser Coke Co.*, 1 O.I.C., 46. However, where the preëxisting disease is aggravated and accelerated by the accident it is compensable. *Wells v. Patterson Bros. Tobacco Co.*, 2 O.I.C., 372. *Clay v. Stonoga Coal Co.*, 3 O.I.C., 174. *Weston v. Kaufman & Co.*, 3 O.I.C., 186. *Bryant v. Farmers Guano Co.*, 8 O.I.C., 363. *Fenton v. Thorley & Co.*, 19 T.L.R., 684. Five Workmen's Compensation Cases, p. 1, gives a full discussion concerning accidents within the meaning of the Compensation Statute. This is an English case. Another English case bearing on the question the instant case presents is *Willoughby v. Great Western Railroad Co.*, 117 L. T. Journal, 132, Six Workmen's Compensation Cases, p. 28.

Turning to the American cases, in addition to the Virginia compensation cases, above cited; we find that the English decisions are supported by the weight of authority in this country. *Gilliland et al. v. Ash Grove Lime and Cement Co.*, 180 Pacific, 793; *Jakup v. Industrial Commission*, 123 N.E., 263; *Mailman v. Record Foundry and Machine Co.*, 106 Atl., 606; *Gaffney v. Goodwillie Bros.*, 169 N.W., 849; *Lundy v. George Brown & Co.*, 108 Atl., 252; *St. Clair v. Meyer Music House*, 178 N.W., 705; *In re Bowers; In re Williams; In re Colan;* 116 N.E., 842.

In a more recent American case, that of *Texas Employers' Insurance Association v. Wonderley et al.* (Court of Appeals of Texas, March 20, 1929), 16 Southwestern Reporter (2d) 386, the Court, with permission, makes this statement: "Infection is the natural result of the wound whether it is usual or unusual, if there is a direct causal connection between the injury and the disease, so that the disease is directly attributable to the injury.'" *Bramble v. Shields*, 146 Md., 494, 127 A., 44; *Dickson Construction and Repair Co. v. Beasley*, 146 Md., 568, 126 A., 907; *King v. Buckeye Cotton Oil Co.*, 155 Tenn., 491, 296 S.W., 3, 53 A.L.R. 1086; *Bethlehem Shipbuilding Corporation v. Industrial Accident Commission*, 181 Cal., 500, 185, p. 179, 7 A.L.R., 1180, and note; *Texas Employers' Insurance Association v. Drews* (Tex. Civ. App.), 297 S.W., 630; *Consolidated Underwriters v. Free* (Tex. Civ. App.), 253 S.W., 941.

The medical testimony in this case is that this plaintiff was suffering from syphilis prior to the injury. However, that same testimony is that the injury to the plaintiff's ankle was the exciting cause of her present disability; that the accident inflamed into activity, aggravated, and accelerated her disease. In our view of the true intent and meaning of the Statute, where by reason of an accident either a disease is caused or accelerated or intensified thereby, the employee is entitled to be compensated according to the provisions of the Act.

The Workmen's Compensation Act, the Courts of other jurisdictions time and again have stated, must be construed liberally, and this is always in the mind of the Commissioner in arriving at a decision in a claim for compensation. Of course, the requirements of the law must be met, but we feel that the liberal construction which should be given to this Act could not lead to any other conclusion than to hold that the plaintiff in this case is entitled to compensation for her present disability; that her present disability resulted naturally and unavoidably from the accident she sustained on September 19, 1929, accelerating and aggravating a preëxisting disease; and an award will therefore be made in favor of Mrs. Willow Ballard.

Award

The defendant will pay to the plaintiff, compensation, during temporary total disability at the rate of 60 per cent of $15.13, or $9.08 per week, not to exceed four hundred weeks, as provided for in Section 29 of the Act. The defendant will pay all medical, surgical, hospital, and other treatments not to exceed ten weeks, as provided for in Section 25 of the Act. Concerning the costs of this hearing, each party will pay its own.

[Docket No. 57]

ELBERT LEDFORD, Employee, Plaintiff, v. VICTORY YARN MILLS COMPANY, Employer, and MARYLAND CASUALTY COMPANY, Defendants

HERNIA.—Where claimant fails to prove the existence of a hernia under conditions prescribed in Section 2 (r) compensation therefor to be denied.

Filed November 15, 1929

Hearing before J. DEWEY DORSETT, Commissioner, at Gastonia, N. C., November 8, 1929.

Plaintiff represented by *Mr. A. E. Woltz* and *Mr. J. M. Hoyle.*
Defendant represented by *Mr. W. C. Ginter*, Adjuster for the Maryland Casualty Company.

Opinion by DORSETT, Commissioner.

Statement of the Case

Elbert Ledford, the claimant, shows that on August 13, he was in the employ of the Victor Yarn Mills Company located in Gastonia, N. C., his average weekly wage being $13.20. He claims that while engaged in pushing a box of "comber waste" on the concrete platform leading to the waste house, that a piece of slatting on the waste box pulled off, causing the box to get away from him, and while running after the box he ran against the corner of it, injuring his side; the said injury resulting in a hernia. There was only one witness to the alleged accident—the boy's father.

The claimant reported this accident to his employer on August 21, something like a week after the occurrence of it. He saw Dr. Swann, however, about this injury on August 17, 1929, some four days after the accident was supposed to have occurred. This doctor testifies that he examined the claimant; that he found him complaining of his right side, and that the claimant seemed to think he had a rupture, but that he, the doctor, could not find any rupture. Dr. Swann saw the claimant again on August 21, and was not able to find any rupture on that date, and he suggested that this claimant see Dr. Glenn, a surgeon of Gastonia.

Dr. Glenn was not present at this hearing, and we therefore do not have the benefit of any information he might have to offer. However, Dr. Swann states that Dr. Glenn failed to find a rupture, but advised this claimant to return to see him (when it came down). Dr. Swann saw this claimant again on September 24, and the examination revealed what the doctor thought was an enlarged lymphatic gland. It seems that Dr. Glenn wrote a letter to Dr. Swann stating that on Dr. Glenn's last examination he found a small hernia. Dr. Glenn stated that when he examined him on September 21, that he found an enlarged lymphatic gland in his groin. Dr. Swann testified that on his first examination, "in examining the external ring where these ruptures so frequently occur, he didn't show any particular soreness; there should be soreness if it was a recent rupture; that went through my mind." Dr. Swann stated that when he first examined this claimant he saw no bruises, and saw no indication of where there had been any bruises or special hurt.

It seems that the claimant saw five doctors concerning the rupture complained of, and we have the benefit of the evidence of one Dr. Patrick, who testifies that he saw the claimant two or three months ago, or sometime in August; that the claimant told him that he had been injured on August 13; and that after examining this claimant he was of the opinion that the boy was ruptured, but that he did not know the cause of it and that he could not tell whether it was traumatic or congenital and would not venture an opinion as to the cause.

There is no positive medical testimony that the hernia complained of was caused by the accident on August 13. We must have not probable testimony, but positive testimony. The Workmen's Compensation Act, the courts time and again have stated, must be construed liberally; and this is always in the minds of the Commission in arriving at a decision in a claim for compensation. There are certain requirements of the Law, however, that must be met.

There is little doubt in the mind of the Hearing Commissioner that this claimant has a hernia, but from all the testimony this hernia did not appear suddenly, and other symptoms mentioned in 2 (r) of the North Carolina Workmen's Compensation Act were not shown. Therefore, it cannot be held that the hernia suffered by this claimant is one such as contemplated by the provisions of the Act.

It follows that the case must be dismissed; each party will pay its own costs in this proceeding.

[Docket No. 67-68]

HUBERT SAMUEL, Employee, ENNIS THOMPSON, Employee, and DR. C. H. HEMPHILL, v. JACK LONG CONSTRUCTION COMPANY, AND GLOBE INDEMNITY COMPANY, Defendants

Filed November 14, 1929

MEDICAL ATTENTION.—Where employer fails to pay physician's bill for services rendered injured employees and hearing is necessary thereon, an award will be for the payment of the bill and allowance for physician's fee for attending the hearing.

Hearing before J. DEWEY DORSETT, Commissioner, at Durham, N. C., November 9, 1929.

Dr. C. H. Hemphill appeared in person; other plaintiffs not present.
Defendants not represented.

Opinion by DORSETT, Commissioner.

Statement of the Case

These cases were set for hearing on motion of this Commission for the purpose of investigating the failure of the Jack Long Construction Company to file proper reports of accidents with this commission, as well as the failure of the said Jack Long Construction Company and his insurance carrier to pay the necessary medical bills incurred in rendering medical attention to the employer's injured employees. All of the parties to this cause were duly notified as to the date of the hearing. The defendant employer failed to appear. Dr. C. H. Hemphill who rendered medical attention, and a representative of the insurance carrier were present.

Dr. Hemphill testified that these two injured employees, Ennis Thompson and Hubert Samuel, came to him for medical attention, that the employees were sent to him by one G. B. Steele, a foreman for the Jack Long Construction Company. Dr. Hemphill rendered the necessary medical attention, and has rendered a bill to the employer in the amount of $8.00 covering his charges for rendering medical treatment to the injured employees. This bill has not been paid.

This Commission has never received any reports of these accidents from the employer, or the insurance carrier. At this hearing the insurance representative stated that the reason he had not filed any reports was due to the fact that he has never been able to get any reports from the employer, and that he knew nothing about any of the accidents until notified by the doctor and this commission. The physician's reports show that Ennis Thompson was injured on July 23, and that the injury was of a minor nature; and that Thompson continued to work. Hubert Samuel was injured on August 2, 1929; the injury was of a minor nature, and the employee lost no time.

From the evidence this Commission finds that the Jack Long Construction Company, as well as his employees, Thompson and Samuel, are bound by the provisions of the North Carolina Workmen's Compensation Law; and that the Globe Indemnity Company, the insurance carrier, is liable for the cost of the medical bills incurred. From the nature of the injuries the treatment rendered was only first aid, and consisted of ordinary office calls, and we find that Dr. Hemphill is entitled to be paid $4.00, or $2.00 each for rendering medical attention to the plaintiffs Samuel and Thompson.

Under Section 54 (a), this Commission has the power to make rules not inconsistent with this Act, for carrying out the provisions of this Act. Upon this authority the Commission has adopted a rule requiring every employer to keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment, and report to the Industrial Commission within ten days after the occurrence, or the knowledge thereof, of all accidents requiring medical or surgical attention, or causing the employee to be absent from his work. This report shall be made in writing on the forms prescribed by the Industrial Commission for that purpose. This rule is No. 14, in Bulletin No. 1, Volume 1, of May, 1929. The employer, the Jack Long Construction Company, has clearly violated this rule. It is important that the employer coöperate with this Commission in the administration of the law.

Award

The defendants will pay to Dr. C. H. Hemphill of Chapel Hill, N. C., the sum of $4.00 for medical attention rendered the plaintiff employees, and the sum of $10.00 to Dr. Hemphill to cover mileage and attendance at this hearing. The defendants will pay the costs of this hearing.

[Docket No. 63]

SAM GILBERT, Employee, Plaintiff, v. WELCH FURNITURE COMPANY, Employer, LONDON GUARANTEE AND ACCIDENT COMPANY, Carrier, Defendants

Filed November 13, 1929

HERNIA.—Where plaintiff establishes the requirements of Section 2 (r), an award will be ordered for operation for hernia and compensation for total disability.

Hearing before J. DEWEY DORSETT, Commissioner, at High Point, N. C., November 6, 1929.

Plaintiff appeared in person.

Defendant represented by *J. C. King*, Adjuster for the London Guarantee and Accident Company.

Opinion by DORSETT, Commissioner.

Statement of the Case

Sam Gilbert, plaintiff, claims compensation because of an accident resulting in a hernia that arose out of and in the course of his employment. Liability on the part of the insurance company is based on the ground that there was no accident. It is admitted by the defendants that the plaintiff was regularly employed by the Welch Furniture Company as a laborer, at an average weekly wage of $11.00. It is further admitted that all of the parties to this proceeding are bound by the provisions of the North Carolina Workmen's Compensation Law.

It is in evidence that this plaintiff has already been operated upon by Dr. Burrus of the Burrus Clinic of High Point, N. C., the plaintiff having gone to Dr. Burrus suffering great pain, and upon advice of Dr. Burrus underwent an operation. Dr. Burrus testifies that the plaintiff came to his office claiming that he had sustained an accident resulting in a hernia; that he treated him and operated upon him. The history of the case was the history of the injury sustained while employed by the defendant, pain immediately followed the accident, and the claimant also noticed some bulging. It was a left inguinal hernia. The ring was open about three-quarters of an inch, and there was a thin and recent hernia sack of about one and one-half inches long. Dr. Burrus testified that in his opinion the hernia complained of was a traumatic hernia, and that he was also of the opinion that this plaintiff could have accidentally injured himself in the manner that he claims he was injured, causing the said hernia.

This plaintiff and a fellow employee by the name of John Gallimore both testified concerning the accident. It seemed that these two employees were pushing a truck loaded with bureau dresser drawers, and that the weight of the truck and material was around 900 pounds. In pushing this truck the claimant alleges that he strained himself; that he felt a pain in his stomach; felt a sensation like something was tearing loose; that he immediately told his fellow employee about the strain and the sensation that he had. The fellow employee, John Gallimore, corroborated the plaintiff's testimony.

The question in this case is whether the claimant sustained a hernia under the conditions necessary to entitle him to compensation. The evidence clearly shows that he had sustained a hernia under such conditions, and the insurance carrier is therefore ordered to pay the cost of the operation together with compensation at the rate of $7.00 per week. His average weekly wage was $11.00, which would make the minimum weekly payment as provided under the Act applicable.

Compensation will be paid during the resulting disability at the rate of $7.00 per week, not to exceed four hundred weeks.

The cost of this hearing is taxed against the defendants.

[Docket No. 19]

HETTIE H. SMITH, Administratrix of JUNIUS HERBERT SMITH, JR., Deceased, Plaintiff, v. CAROLINA POWER & LIGHT COMPANY, Self-insurer, Defendant

Filed November 13, 1929

FATAL CASES—PERSONAL REPRESENTATIVE—DEPENDENTS.—Where finding is made that deceased left dependents compensation will be denied personal representative for that the Legislative intent was that the benefits of the Act should flow to the dependents of the deceased employee. Section 29 in case of death is ambiguous and not specific. Sections of the Act providing for payment to specific beneficiaries control awards made thereunder.

CONSTRUCTION OF THE ACT.—Section 29 being ambiguous rule of our Supreme Court declares Acts of the Legislature that are vague, indefinite and uncertain to be inoperative and void. See *Boyd v. Brooks*, 197 N. C., 655.

Hearing before J. DEWEY DORSETT, Commissioner, at Oxford, N. C., on November 5, 1929.

Plaintiffs represented by *Mr. B. S. Royster, Jr.*, of Oxford, N. C.

Defendants represented by *Mr. L. G. Benford* of the Legal Department of the Defendant Company.

Opinion by DORSETT, Commissioner.

Statement of the Case

Junius Herbert Smith, Jr., met with a fatal accident on August 29, 1929. The defendants admit that the deceased met with an accident while regularly employed by the defendent, and that the said accident resulting in the death of Junius Herbert Smith, Jr., arose out of and in the course of his employment with the defendant. It is also admitted that the average weekly wage at the time of the fatal accident was $18.11.

A hearing in this cause entitled, "Junius Herbert Smith, Jr., Employee, deceased, J. H. Smith, Hettie Harris Smith, Charlotte H. Smith, Lacy E. Smith, Helen L. Smith, W. Daniel Smith, Plaintiffs, v. Carolina Power & Light Company, Employer, Self-insurer, Defendant," was held on September 23, 1929, before Commissioners Dorsett and Wilson, at Oxford, N. C. Upon hearing in the above styled case, the Commission found from all the evidence that Mrs. Hettie Smith, mother of the deceased, Junius Herbert Smith, Jr., was his sole partial dependent. An opinion was filed and an award made to Mrs. Hettie Smith, directing the defendant Carolina Power & Light Company to pay compensation at the rate of $4.78 per week, for a period of three hundred and fifty weeks, funeral expenses not to exceed $200.00, and the cost of the hearing. No appeal has been perfected from this opinion and award.

Since the date of the hearing on September 23, 1929, Mrs. J. H. Smith has duly qualified as administratrix of the estate of Junius Herbert Smith, Jr., deceased, such qualification is recorded in the office of the Clerk of the Superior Court of Granville County in Book No. 4, Record of Administrators. As administratrix, Mrs. Smith through her able counsel is contending that the Carolina Power & Light Company, the defendant, pay to her the maximum amount of $6,000.00, as provided in Sections 29 and 41 of the North Carolina Workmen's Compensation Law for death benefits.

The defendant, Carolina Power & Light Company, contends that they have complied with the provisions of the North Carolina Workmen's Compensation Law in that they are now paying to Mrs. Hettie Smith as the sole partial dependent of the deceased, compensation as called for in an opinion and award directed by this Commission under date of September 30, 1929, the said opinion and award being based on the hearing conducted by this Commission on September 23, 1929. The defendant introduces as a part of this record the testimony in the first hearing; counsel for the plaintiff objects to the introduction of this testimony; objection was over-ruled and exception noted. From the evidence the Commission makes the following

Findings of Fact

1. That Junius Herbert Smith, Jr., while regularly employed by the defendant, met with an accident on August 29, 1929, resulting in his death. The fatal injury by accident arose out of and in the course of his employment. His average weekly wage was $18.11. Parties, plaintiff and defendant, are bound by the provisions of the North Carolina Workmen's Compensation Law.

2. A hearing was held in this same cause on September 23, 1929, at Oxford, N. C., and compensation awarded to Mrs. J. H. Smith as the sole partial dependent as provided in Section 38 of the North Carolina Workmen's Compensation Law, whereupon an opinion was filed and an award thereupon was made under date of September 30, 1929, directing the payment by the defendant to Mrs. J. H. Smith as sole partial dependent, compensation at the rate of $4.78 per week, for a period of three hundred and fifty weeks, and funeral expenses not to exceed $200.00, together with the cost of this

hearing. There has been no appeal perfected upon the above award of September 30, 1929.

3. Mrs. J. H. Smith has duly qualified as administratrix of the estate of Junius Herbert Smith, Jr., and as such is not entitled to recover under Sections 29 and 41 of the North Carolina Workmen's Compensation Law, as compensation has been awarded to dependents as provided for in Section 38 of the said Compensation Law.

Upon the foregoing findings of fact the Commissioner arrived at the following

Conclusions of Law

The determinative questions involved in this case are:

1. The Legislative intent as to the amount of compensation benefits payable in case of a deceased employee whose death was caused by accidental injury arising out and in the course of his employment.
2. To whom such benefits are payable where there are dependents.
3. The manner and time for making such payments.

It is a well-recognized principle of law that in the construction of any legislative act the courts endeavor to arrive at the real intent and purpose of the legislature in adopting the act being considered, to give meaning to every section and word of the act in so far as can consistently be done, and in doing this the act as a whole must be scrutinized with the view of making effective every part thereof where this does not violate the clear intent and purpose of the whole. In the case of *Fortune v. Buncombe County Commissioners*, 140 N.C., 322, we find that the Supreme Court has said: "A statute should be construed with reference to its general scope and the intent of the Legislature in enacting it, and in order to ascertain its purpose the courts must give effect to all its clauses and provisions and must construe ambiguous language in such a sense as will conform to the scope of the act and effectuate its object."

Aside from the written opinions of the courts of the many states construing similar acts as the North Carolina Workmen's Compensation Act, this act itself volubly expresses the main purpose and intent thereof; the act is entitled "Workmen's Compensation." Its many sections repeatedly refer to the benefits to the injured employee and his dependents. The Act defines "Compensation" as "the money allowance payable to an employee or *to his dependents* as provided for in this act and includes funeral benefits provided herein." (Sec. 2 k).

This Commission has published in its Bulletin No. 1, page 7, a portion of an opinion written by Justice Pitney of the United States Supreme Court in *New York Central Railroad v. White*, 243 U. S., 188. This opinion sustains the constutionality of the New York Compensation Act, and Justice Pitney points out the evils which the compensation laws remedied as being the conditions that existed in industry with its relations to its injured employee such as to make the injured employee and *his dependents* a burden upon public or private charity.

There can be no doubt that the legislature intended that the benefits of the act were to flow to an injured workman if the injury did not produce death, and if death resulted from the injury the benefits were primarily for the benefit of either dependents or partial dependents, and should there be neither then the personal representative should collect the benefits.

By exclusion, except for Section No. 29 and Section No. 40, which will be treated separately hereafter, we find that death benefits are payable only to dependents of an injured employee who were so dependent for three months prior to the accident causing the injury that resulted in death.

The first section of the act in which personal or legal representative is mentioned in Sec. 2 (b): "Any reference to an employee who has been injured shall, when the employee is dead, include also his legal representative, dependents and other persons to whom compensation may be payable." The compensation payments referred to are provided for only in Sections 29, 30, 31, 38, 40.

Section 29, except for the last clause, provides for payment to be made to the injured employee for total disability—which of course ceases upon death of the injured employee from causes other than the injury. Bearing upon this and giving light upon this interpretation, we find that Section 38 provides: "If death results proximately from the accident and within two years thereafter, or while total disability still continues and within 6 years after the accident, the employer shall pay for or cause to be paid subject to the other sections of this act in one of the methods hereinafter provided to the dependents of the employee," etc.

Nothing else appearing than the quotation from Sections 29 and 38, the conclusion is inevitable that for cases of total disability to an injured employee, the legislature clearly intended that for compensation for total disability the payments were to be made to an injured employee, and in case of death proximately caused by the injury while total disability continued and within six years after the accident the payments shall continue to be made to the deceased's dependents from date of last payment to the injured workman.

Section 30 provides for compensation payments for partial incapacity which cease upon death of the injured employee unless it is such a case as would come within the purview of Section 38 and within two years after the accident subsequent payments thereon to be continued to the dependents of the deceased.

Section 31 provides for certain specific payments for injuries, and we find that Section 37 specifically requires any unpaid balance due under Section 31 at the death of the injured shall be paid to the next of kin, *dependent* upon the deceased employee unless death is due to a cause compensable under the Act and the *dependents* are awarded compensation therefor, whereupon the specific payments are to cease.

Section 38 provides for payments *to dependents*, if any of employees in case of death caused proximately by the accident as set out above.

Section 40 provides for payments to the personal representative of the deceased employee where there are *no dependents.*

We have shown that except for the last sentence in Section 29 and Section 40, there is no provision made for compensation payments as referred to in Section 2 (b) to be made to any persons other than the injured employee and his dependents.

The last clause of Section 29 is ambiguous and conflicts with Sections 38 and 40; considered alone with the provisions of this section it is meaningless. The section deals with payments to be made to injured employee for total incapacity for work which total incapacity ceases upon the natural death of the injured employee. To construe it as having any connection with any other portion of this Section 29 would be to construe the legislature as having written into the act a life insurance policy upon the life of every injured employee in this State maintaining a temporary or permanent total disability in the amount of $6,000.00. Such a construction would be wholly at variance with the intent and purposes of the whole act, and contrary to public policy.

Since it is clearly the primary intent of the Workmen's Compensation Act of this State and other states to provide for compensation to injured employees or their dependents in case of death of employee from injuries resulting proximately from industrial accidents. Then, second: In case there are *no dependents* the compensation shall be commuted to its present value and paid to the personal representative. Substantiating this construction we find Section 38 provides for payments in case of death proximately caused by accident where there are dependents, and Section 40 provides for payments in case of death caused by accident where there are no dependents. Isasmuch as the last clause of Section 29 is redundant as it appears in connection with any other portion of Section 29, and is specific neither as to the question (a) was death caused proximately from accidental injury or not; nor the question (b) was the payment to be made if dependency existed or not. We must conclude that the clause is merely one of limitation of death benefits to an amount of $6,000.00 and a general clause as relates to the question, "In case of death the total sum paid shall be six thousand dollars," leaving us to look elsewhere to ascertain the legislative intent as to the specific questions of the beneficiary and amounts where there are dependents, or are *no dependents*, such cases being specifically provided for in Sections 38 and 40. In a recent opinion by Chief Justice Stacy in which he dissents from the court opinion in the case of *Boyd v. Brooks*, 197 N. C., 655, is stated this principle: "Where an act of the Legislature is so vague, indefinite and uncertain that the courts are unable to determine, with any reasonable degree of certainty, what the Legislature intended, or is so incomplete or is so conflicting and inconsistent in its provisions that it cannot be executed, it will be declared to be inoperative and void."

Our Supreme Court in the case of *School Commission v. Aldermen*, 158 N. C., 165, have thus stated the rule of construction in similar cases where there is a conflict between the general clauses and specific clause, as follows:

"The ordinary and accepted rule of interpretation is that when a general intent is expressed in a statute, and the act also expresses a particular intent incompatible with the former, the particular intent is to be considered in the nature of an exception." I Lewis Sutherland on *Statutory Construction* (2d Ed.), 268.

Considering the foregoing with the rule of our court as set out just above, we must conclude that Section 38 of the act expresses the legislative intent in such a case as is now before us of a compensable injury resulting in death with the deceased having dependents dependent upon him for support at the time of the accident.

The case is dismissed; each party will pay its own costs.

[Docket No. 37]

M. S. HAYES, Employee, Plaintiff, v. LIBES & MATHIS, Employer, and GEORGIA CASUALTY COMPANY, Carrier, Defendants

[Filed November 12, 1929]

Loss of Use.—Where the evidence shows no loss of use after recovery from total disability compensation therefor to be denied.

Hearing before J. Dewey Dorsett, Commissioner, at Winston-Salem, Forsyth County, N. C., October 22, 1929.

Plaintiff appeared in person.

Defendant insurance carrier represented by *Mr. W. H. Phillips*, of Greensboro, N. C., Adjuster for the Georgia Casualty Company.

Opinion by Dorsett, Commissioner.

Statement of the Case

M. S. Hayes met with an accident which arose out of and in the course of his employment with Libes & Mathis, employers, of Winston-Salem, N. C. His average weekly wage was $30.00.

A memorandum of agreement for the payment of $18.00, the maximum weekly amount allowed under the North Carolina law, a week, was entered into and compensation has been paid for two weeks, plus medical and hospital expenses.

The plaintiff was injured on August 31, 1929. The physician who attended this plaintiff reported to this Commission and testified in this hearing that the plaintiff was able to return to work on September 23, 1929. The plaintiff returned to work on that date, but claims that he just returned to the job (he was a foreman) to see what was going on, and that he did not return to work and was not able to return to work, and that he actually returned to work on September 27, 1929; that he was just standing around before that time. His contention is that he returned to work for his employer 28 days and one hour after his injury, and is therefore entitled to four weeks' compensation. The plaintiff further contends that he is still disabled because of the accident and for this reason he refuses to sign the final receipt for two weeks' compensation as per agreement. The evidence discloses that the plaintiff received pay for the time he worked from September 23 until September 28, on which day he was fired. The amount of money received by this plaintiff for this work is $24.60.

Doctor Benbow, the attending physician, testifies that he saw the plaintiff just after the injury; that he gave him first aid treatment; and that the latter saw him at his home, that he paid several visits to this plaintiff's home for the purpose of attending him; that he is of the opinion that the plaintiff was able to return to work three weeks from the date of the accident; that he informed the employer and the Industrial Commission to this effect. The doctor requested the plaintiff to come to his office on September 23 for a final examination. The plaintiff did not do this, but instead returned to work. Dr. Benbow's last examination of this plaintiff prior to his return to work was on September 20, and the doctor says he was all right at that time. Dr. Benbow further stated upon cross-examination by counsel for the defendant, that he was requested by this plaintiff not to report him back to work until September 30, in order that he might draw four weeks' compensation; otherwise, he would get only two weeks' pay. Dr. Benbow further testified that in his opinion this plaintiff will suffer no permanent loss of use of the foot because of the accident. The Hearing Commissioner requested Dr. Benbow to make an examination of this plaintiff as soon after this hearing as possible. This examination has been made and the doctor reports that he could not tell which foot was injured at this time; that all the difference he can find in either foot by manipulation, observation, and movements of the affected member is that one is the right foot and the other is the left foot; that his left foot was the injured one, and from the examination he was not able to detect any signs whatever that would show that the plaintiff had ever been injured; and that at this time there were no signs whatever of swelling. The doctor further testifies that the plaintiff claims that his foot hurts him to this day.

From all the evidence the Commission makes the following

Findings of Fact

1. That the parties, plaintiff and defendant, are bound by the provisions of the North Carolina Workmen's Compensation Law.

2. That the plaintiff was injured while regularly employed by the defendant employer; the injury resulting from an accident arising out of and in the course of his employment.

3. That at the time of the injury the plaintiff was making $30.00 per week, and is therefore entitled to receive as compensation the maximum amount allowed, or $18.00 per week, while disabled.

4. The total disability to this plaintiff terminated on September 23. This plaintiff worked a few days prior to being fired, after returning to work on the 23rd; but has been paid for this work by the employer.

Conclusions of Law

The plaintiff is entitled to receive compensation for two weeks as per original memorandum of agreement. If this compensation has not been paid the defendant insurance carrier is hereby ordered to pay the same. This claim with reference to additional compensation is dismissed, each party paying his own costs. That Dr. Benbow's bill for examination be paid by defendants.

[Docket No. 26]

MELVIN WILLIAMS, Plaintiff, v. J. MARVIN THOMPSON, Employer, and NATIONAL CASUALTY COMPANY, Carrier, Defendants

Filed November 7, 1929

DISEASE.—Gonorrhea Ophthalmia. Section 2, sub-section (f), provides that disease to be compensable must result naturally and unavoidably from the accident. An eye once infected the way is open for further infection which is natural and inherent, even though subsequent infection comes from external source. Tendency is toward any and all infection. Disease unavoidable where common prudence and foresight cannot prevent it. Not necessary to show the source of infection by direct evidence. The Act should be liberally and broadly construed so as to effect its general purpose. Where a direct causal connection is shown between the injury and the disease, it is attributable thereto and compensation allowed.

Hearing before Commissioner T. A. Wilson, at Raleigh, N. C., October 8, 1929, at 10:30 a.m., at the offices of the Industrial Commission.

Plaintiff represented by *R. L. McMillan*, Attorney, of Raleigh, N. C.

Defendants represented by *W. T. Joyner*, *I. B. Lake*, and *I. O. Brady*, of the law firm of Smith & Joyner, Raleigh, N. C.

Opinion by WILSON, Commissioner.

Summary of Case

Plaintiff, Melvin Williams, sustained an injury to his eyes on Thursday, July 4, 1929, as a result of gasoline, oil, and other substance getting in them when he opened the carburetor of a truck while regularly by J. Marvin Thompson, Contractor; that plaintiff the following Monday reported same to his employer; said injury "irritated and inflamed his eye and resulted in ulcer"; plaintiff did not work after the 11th of July; that about seven days after the accident, Dr. Gibson first treated plaintiff's eyes and there was no gonorrhea at this time; that Dr. Gibson gave him some lotion to use and kept plaintiff under observation; Dr. Gibson treated plaintiff's eyes three times prior to time gonorrhea ophthalmia showed up, which was the thirteenth day after said injury to eyes; that as a result of infection from said accidental injury plaintiff's right eye was removed and he suffered a partial loss of vision in his left eye which has a "synchisis of the iris to the cornea," extent of loss to be determined by further examination.

Doctors Gibson and Neal testified that plaintiff did not have gonorrhea; plaintiff testified that he has never had gonorrhea.

Upon the evidence in this case, the Commission makes the following

Findings of Fact

1. That plaintiff, Melvin Williams, the defendant, J. Marvin Thompson, have both accepted the provisions of the Compensation Act, and National Casualty Company is the insurance carrier for defendant.

2. That plaintiff sustained an injury by accident to his eyes on July 4, 1929, as a result of gas, oil and other substance from a carburetor falling

into his eyes while regularly employed by defendant employer, said accident arising out of and in the course of plaintiff's employment.

3. That as a result of said accidental injury plaintiff was totally disabled from July 12 to September 5, 1929, inclusive.

4. That as a result of said accidental injury plaintiff's eyes became irritated and infected necessitating the removal of his right eye on September 6, and causing the partial loss of vision in his left eye (testimony was not definite as to extent of partial loss, therefore, this point will have to be determined by examination of plaintiff by an eye-specialist).

5. That plaintiff's accidental injury and infection, with resutling loss of right eye ball and partial loss of vision in the left eye clearly comes within all the requirements as set forth in Section 2, sub-section (f), of the Compensation Act.

6. That plaintiff's average weekly wage was $16.50.

7. That hospital, medical, surgical and doctors' bills have not been paid.

Upon the foregoing findings of fact the Commissioner bases the following

Conclusions of Law

Section 2, sub-section (f), reads: "'Injury' and 'personal injury' shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results, naturally and unavoidably, from the accident."

There are three requirements set forth in Sub-section (f), Section 2, for an "injury" or "personal injury" to be compensable, to wit: (1) "by accident"; (2) "arising out of"; (3) "and in the course of."

But the said section goes further and says: "and shall not include a disease in any form, except where it results, *naturally* and *unavoidably*, from the accident."

The original accidental injury clearly comes within the purview of Subsection (f), Section 2, and as a result of said injury to plaintiff, Dr. Gibson testified that upon first examination: "I found very badly irritated condition of cornea of right eye and left eye; very small ulceration of both cornea." Webster's Unabridged Dictionary says an ulcer is "a sore discharging pus." Thus, upon the first visit and as an immediate result of said accident plaintiff had an infected eye of grave proportions that readily predisposed itself to further infections or disease.

"Disease," to be compensable under the Compensation Act, must fulfill two requirements as set forth in Sub-section (f), Section 2, to wit: "where it results (1) 'naturally' and (2) 'unavoidably' from the accident."

"Naturally," according to Webster's Dictionary means, "by natural, native, or inherent character; spontaneously; without cultivation or use of art or effort." By the same authority, "spontaneous" means "readiness or tendency." It is obvious that once an eye has an infection the way is opened for further infections and they are "natural" and "inherent" even if said infection should come from an external source for there is a readiness or "tendency" toward any and all infections. Dr. Gibson testified: "I think the defense of infection of damaged tissues in case of gonorrhea compared to healthy tissues would be *ten times* more liable." Dr. Neal testified: "injury does predispose tissues to infection"; "that this is necessarily true with the eye."

Said Sub-section further says the disease must result "unavoidably from the accident." In *Dygert v. Bradley*, 8 Wend. (N. Y.), 473, the Court used the following words pertaining to unavoidable accident: "Not necessarily an accident which it was physically impossible, in the nature of things, for the person to have prevented." "A result that is 'unavoidable' need not be absolutely inescapable." *In re MacLaughlin* (C.C.A.N.Y.), 9 F. (2d), 534, 535. "A thing is generally considered 'unavoidable' when common prudence and foresight cannot prevent it. Disease results naturally and unavoidably from injury within meaning of Workmen's Compensation Act when contracted in way natural to disease and when it could not have been avoided by victim through exercise of reasonable care and caution." *U. S. Casualty Co. v. Smith*, 129 S.E., 880, 885, 34 Ga. App., 363.

The Commission cannot lose sight of the fact that said plaintiff did not have genital gonorrhea at any time during said infections. He was examined by both Dr. Gibson and Dr. Neal. Plaintiff testified he had never had gonorrhea.

No evidence was submitted to show that said plaintiff had been careless in treatment and care of his eyes. Said plaintiff being a truck driver and not having genital gonorrhea personally, it is human nature, and we have to deal with men as they are and not as we would like for them to be, for him not to be as careful and cautious as one who has a genital infection or who previously had had gonorrhea and had been warned by a doctor or friends as to the possibility of such infection in the eyes. Plaintiff had no reason in the common order of things to suspect a possible gonorrheal infection. Possible infections by venereal diseases are not commonly discussed by people, and especially truck drivers. Therefore, it cannot be said that plaintiff, Melvin Williams, did not use "common prudence and foresight" and "reasonable care and caution," (*U. S. Casualty Co. v. Smith*, *supra*) to prevent gonorrheal ophthalmia.

Dr. Gibson, the eye specialist, who treated said plaintiff, testified "For seven days treated him for ulceration; gave him an antiseptic lotion to use and told him to keep the eye clean, and I cauterized the eye and kept him under observation for a few days and the condition got worse all of a sudden."

In answer to the question: "Is it not natural and unavoidable for one to rub and wipe his eye when irritated or running water?" Dr. Gibson testified: "It is natural, of course, but it can be avoided, and to prevent it one would have to have considerable will power." He further testified: "It would require resistance; in other words it might be resisted mentally or physically but one would certainly have to use resistance."

The only testimony submitted as to how plaintiff contracted gonorrheal ophthalmia, in addition to the predisposed condition of tissues of said plaintiff's eyes as a result of irritations and ulcerations, is the testimony of Dr. Gibson when he said he "gave him (plaintiff) an antiseptic lotion to use." Plaintiff is a truck driver, 27 years old, married a widow with five children, and he has two children from said marriage; he makes $16.50 per week, and it is quite evident he has had but limited education, and but few, if any, advantages of the world. Therefore, what might be considered lack of "common prudence and foresight" by some one college bred and recipient of many advantages of this world cannot be said of this worker who is but a degree above a common laborer. The same is true as to "exercise of reasonable care and caution" to prevent resulting disease.

Dr. Gibson testified: "I am sure that he did not have gonorrhea the seventh day." Dr. Gibson gave plaintiff "an antiseptic lotion to use" and the "thirteenth" day "gonorrhea ophthalmia showed up." Therefore, it is reasonable for the Commissioner to presume that the gonococcus germ had its inception while plaintiff was treating himself with the lotion, either at the hands of some one assisting him or the use of a towel infected with the gonococcus germ in the course of his treatment. Thus, the gonorrhea ophthalmia "was a direct consequence of the accident." *Cline v. Studebaker Corp.*, 189 Mich., 514; L.R.A., 1916 C., 1139, 155 N.W., 519, (1915), 15 N.C.C.A., 588. *Canadian Pac. R. Co. v. Flore*, 24 Dom. L. Rep., 710, (1915), 15 N.C.C.A., 589.

"It is not necessary to show the source of infection by direct evidence." *Cline v. Studebaker Corp., supra.*

"After claimant had visited a physician he took it upon himself to treat his eye by the use of a potato poultice, which, defendant alleged, destroyed the sight of the eye, the Court in affirming an award, said that, in view of the fact that claimant was a man of limited education, no more knowledge could be expected of him than he actually possessed, and in the present case his conduct was not so unreasonable as to defeat a recovery." *Riley v. Mason Motor Co.*, 199 Mich., 233, 165 N.W., 745, 15 N.C.C.A., 78. See *Bethlehem Shipbuilding Corp., Ltd., v. Indus. Acc. Comm. of Cal.* (1919), 185 Pac., 179.

The Workmen's Compensation Act should be so liberally and broadly construed as to effect its general purpose in every instance in which its language is such as to render judicial interpretation necessary. See *Austin Bros. Bridge Co. v. Whitmire*, 121 S.E., 345, 31 Ga. App., 560. Also see *Jones v. Georgia Casualty Co.*, 117 S.E., 467, 30 Ga. App., 207, judgment reversed; *Georgia Casualty Co. v. Jones*, 119 S.E., 721, 156 Ga., 664, and judgment vacated; *Jones v. Georgia Casualty Co.*, 120 S.E., 558, 31 Ga. App. 196; *Sole v. Kindelberger*, 114 S.E., 151, 91 W. Va., 603; *Delinousha v. National Biscuit Co.*, 161 N.E., 431, 248 N.Y., 93; *Indiana Limestone Co. v. Stockton*, 163 N.E., 27.

If there be any fair doubt about this, we resolve it in favor of the plaintiff, for there is a causal connection when the plaintiff was instructed to treat himself at home following original ulcers.

"Infection is the natural result of the wound whether it is usual or unusual, if there is a direct causal connection between the injury and the disease, so that the disease is directly attributable to the injury." *Texas Employers Ins. Assn. v. Wonderly* (Ct. App., Texas, 1929), 16 S.W. (2d), 386. See *Bramble v. Shields*, 146 Md., 494, 127 A., 44; *Dickson Construction and Repair Co. v. Beasley*, 146 Md., 568, 126 A., 907; *King v. Buckeye Cotton Oil Co.*, 155 Tenn., 491, 296 S.W., 3, 53 A.L.R., 1086; *Texas Employers Ins. Assn. v. Drews* (Texas Civ. App.), 297 S.W., 630; *Consolidated Underwriters v. Free* (Texas Civ. App.), 253 S. W., 941.

"The definitions should be construed broadly." *Allen-Garcia Co. v. Ind. Com.* (Ill. Sup. Ct., 1929), 166 N.E., 78. See *Field & Co. v. Ind. Com.*, 285 Ill., 333, 120 N.E., 773.

Attorneys for plaintiff and defendants submitted strong briefs with similar cases cited, which were reviewed by the Commissioner.

Upon the foregoing conclusions the Commission directs the following

Award

1. That plaintiff is entitled to 60 per cent of his average weekly wage of $16.50 ($9.90 per week) for the period of total disability dating from July 12 to September 5, 1929, inclusive, as provided for in Section 29.
2. That plaintiff is entitled to 60 per cent of his average weekly wage of $16.50 ($9.90 per week) for a period of one hundred weeks for the loss of his right eye as provided for in Section 31, subsection (q), dating from and including September 6, 1929.
3. That plaintiff is entitled to 60 per cent of his average weekly wage of $16.50 ($9.90 per week) for such time as his percentage of loss of vision bears to the total of 100 weeks for the partial loss of vision in his left eye, as provided for in Section 31, sub-section (t), said percentage to be determined by a recognized eye specialist to be named by the Commission.
4. That plaintiff is entitled to full medical, surgical and hospital treatment and medical and surgical supplies as provided for in Section 25, and it is hereby ordered same shall be paid for such additional time as was necessary beyond the ten weeks as stipulated in Section 25.
5. Defendants to bear the cost.

[Docket No. 4]

HENRY HODGES, Plaintiff, v. ROWLAND LUMBER COMPANY, Self-insurer, Defendant

Filed November 5, 1929

FACIAL AND HEAD DISFIGUREMENT.—Where the finding is there is no serious facial disfigurement compensation therefor will be denied.

Hearing before Commissioners WILSON and DORSETT at New Bern, Craven County, N. C., August 29, 1929, at 11:00 o'clock a.m. Second hearing before Commissioner WILSON October 23, 1929, 10:00 a.m., at New Bern, N. C.

Plaintiff represented by *Mr. Wm. F. Ward*, New Bern, N. C.
Claimant appeared in person.
Defendant represented by *I. O. Moore, Moore & Dunn*, New Bern, N. C.

Opinion by WILSON, Commissioner.

Statement of the Case

Henry Hodges claims compensation for "serious facial and head disfigurement" resulting from an accident on July 2, about 2:30 p.m. The Rowland Lumber Company, of New Bern, self-insurer and his employer, denies same.

Temporary total disability was agreed to as the result of the same accident "arising out of and in the course of employment" of Henry Hodges by the Rowland Lumber Company while feeding the "hog." It was further agreed that the average weekly wage was $18.00, and that all medical, hospital, and doctor's bills, were paid by the defendant. Prior to the hearing claimant had refused weekly compensation for fear it would prejudice claim. He was ordered to accept compensation checks tendered as it would not prejudice his further claim. Dr. Patterson testified that in his opinion Hodges was able to resume work on August 30, 1929.

It was further agreed that claimant's jaw was broken and his chin cut open just underneath the right side. The necessary bridge was furnished Hodges by said company to replace teeth lost, and all other teeth properly repaired.

Several witnesses for claimant testified that they had worked with Hodges for many years and observed his face to be different since the accident. Havens, a shoemaker, testified that claimant's face was "abnormal." The right side was not as "symmetrical" as the left and looked as if he may have had a "stroke." No expert testimony was offered by the claimant.

The medical doctor and dentist testified for defendant. Both testified there would be no "serious facial or head disfigurement." The dentist admitted that claimant's mouth would only be about 80 per cent of normal. He further testified that it would not be noticeable to the layman.

Claimant testified he was satisfied "with the job the dentist gave."

Upon personal examination by Commissioners, the scar, because of size, was scarcely noticeable, and not noticeable when the head is in its normal position. The claimant could smile and the doctor testified none of his face muscles were paralyzed.

No new worthwhile facts were brought out at the second hearing pertaining to disfigurement except the Commissioner's observation.

Henry Hodges testified that he was unable to return to work until October 6 because of continued disability. The Commission erred in the first hearing when it failed to ask Hodges if he was able to return to work, after asking the question of Dr. Patterson if Hodges was physically able to return to work.

"It is a rule that they lay a man off that complains against their Company," Hodges testified. C. T. Ward testified that Mr. Turnbull told Hodges, "That it would cost the company, but he did not tell him that he would not employ him if he brought suit against the lumber company. He told Henry (Hodges) that he would save some expense and Mr. Turnbull would save some himself." Mr. Turnbull was not present at the second hearing.

The intent and purpose of the Compensation Act is to put the adjustment of injury on a friendly basis, and do justice to both employee and employer. Under the old liability system it was often time that the employee who wanted to do what he thought was just and fair and not be contentious did not get "justice"; and on the other hand he who was contentious and ugly about his claim often got more. The compensation act attempts to do away with ill-feeling and injustice, and either employee or employer has a right at any time to request a hearing to get a settlement if he is unable to reach an understanding with other party. The following is quoted from *Comigore* (Now Griffin) *v. Shenandoah Artificial Ice, Power, Heat & Light Company* (Iowa Sup. Ct., 1929), 226 N.W., 124: "The Compensation Act contemplates that relief shall be had, not through the courts or with the aid of lawyers, but through the machinery provided by the Act itself. It has been said that the purpose of the legislature in the enactment of the Act was 'to create a tribunal to do rough justice, speedy, summary, informal, untechnical,' and if a court in the slightest degree intrenches upon the prerogatives of the Commissioner, one encroachment will breed another, until finally simplicity will give way to complexity, and informality to technicality." See *Flint v. Eldon,* 191 Iowa 835, 183 N. W., 344.

It was agreed at the second hearing that Henry Hodges would be returned to his former position with the Rowland Lumber Company.

Plaintiff has refused to sign a final settlement receipt for full compensation up to and including August 29, therefore the cancelled checks were handed to the Commissioner to be checked as to the accuracy of payment. The Commission finds that plaintiff has received payment for only seven weeks, and the plaintiff is entitled to one and three-sevenths weeks more compensation to cover period up to and including first award, or a total of eight and three-sevenths weeks in first award.

It was brought out in the second hearing that plaintiff was unable to return to work until October 6. Therefore, plaintiff is entitled to five and three-sevenths additional weeks of compensation, making a total now due plaintiff six and six-sevenths weeks.

Findings of Fact

1. Both the claimant and defendant are bound by the provisions of the Workmen's Compensation Act of 1929.

2. The claimant was injured on July 2, 1929, about 2:30 p.m.; the injury arose "out of" and "in the course" of his employment while feeding the "hog."

3. Claimant was totally disabled from July 2 to October 6, 1929, inclusive. His average weekly wage at the time of injury was $18.00.

4. Claimant's jaw was broken on right side; chin underneath had scar of about one inch; several teeth were removed because of accident and replaced with artificial teeth, others repaired; lower teeth projected slightly; right side of face was slightly flat or not quite symmetrical as left side.

5. As a result of the accident plaintiff has no resulting serious facial or head disfigurement.

6. All medical, hospital, surgical and dental services were furnished by defendant.

Conclusions of Law

1. Claimant is entitled to 60 per cent of average weekly wage for period of total disability, plus all medical services.

2. Plaintiff is not entitled to compensation for serious facial or head disfigurement.

Award

It is directed that an award be made against the defendant to pay the plaintiff compensation for total disability from July 2, to October 6, inclusive at the rate of $10.80 per week, and that defendant pay all medical and surgical services.

The sum of $20.00 shall be allowed for attorney's fee in this case, payable out of compensation still due plaintiff, payable to William F. Ward.

Each party will bear its own costs.

[Docket No. 40]

ROBERT BOOZER HARDEN, Employee, Deceased, Plaintiff, AMY BOOZER HARDEN, Widow, WILL BOOZER HARDEN, Minor Son, v. THOMASVILLE FURNITURE COMPANY, Employer, and HARTFORD ACCIDENT AND INDEMNITY COMPANY, Carrier

Filed November 5, 1929

ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT.—Injury is received in the course of employment when it comes while the workman is doing the duty which he is employed to perform. It arises out of employment when there is a causal connection between the conditions under which the work is required to be done, and the resulting injury when the injury can be seen to have been contemplated by a reasonable person familiar with the situation. Causative danger must be peculiar to the work—not common to the neighborhood—must not have been foreseen or expected. Must appear to have had its origin in risk connected with the employment, and to have flowed from this source as a rational consequence.

Injury resulting from assault caused by personal malice disassociated from the employment not compensable.

ASSAULT BY CO-EMPLOYEE.—Where assault is result of personal malice growing out of matters personal to two parties disassociated with the work—not compensable.

NIGHT WATCHMAN.—Assault on night watchman during the course of his employment does not arise out of employment where assault resulted from malice personally existing between two parties and entirely disassociated from the employment.

Hearing before J. DEWEY DORSETT, Commissioner, at Lexington, Davidson County, N. C., October 24, 1929.

Plaintiff represented by *Walser & Walser*, Attorneys of Lexington, N. C.

Defendants represented by *Spruill & Olive*, Attorneys of Lexington, N. C., and *James W. Vest*, Adjuster for the Hartford Insurance Company.

Opinion by DORSETT, Commissioner.

Statement of the Case

On the night of August 2, 1929, between 1:00 and 2:30 a.m. Robert Boozer Harden, employed by the defendant, Thomasville Furniture Company, and who at this time was on duty as night watchman, was shot in the right side, back and head by Odell Bruton and death ensued instantly. At the fall term Superior Court Davidson County, Bruton, the assailant, was indicted, tried and verdict of murder in the second degree returned, thereupon, sentence of thirty years imprisonment in the state's prison was imposed and at the time of the hearing Bruton had entered upon service of this sentence.

There is evidence tending to prove that the shooting was the result of the deceased's, Harden's, attentions towards the wife of Bruton. The two men were employed by the same employer but the one, Bruton, worked during the day as a sweeper, the other Harden was night watchman during the night. There is no evidence of any quarrel, misunderstanding, or ill will between the men concerning any matter connected with their work.

Amy Harden, the deceased employee's widow and A. W. S. Harden, age eleven years, was proven to be the only dependents of the deceased.

Upon all the evidence the Commissioner makes the following

Findings of Fact

1. That the deceased employee, Robert Boozer Harden, and the defendant employer, Thomasville Furniture Company, had at the time of this accident accepted the provisions of the North Carolina Workmen's Compensation Act.

2. That the defendant Thomasville Furniture Company had insured its liability for Compensation with the defendant, Hartford Accident and Indemnity Company.

3. That on the night of August 22, 1929, the deceased employee, Robert Boozer Harden, while in the course of his employment as night watchman by the defendant, Thomasville Furniture Company, sustained an injury by shot gun wounds in the hands of Odell Bruton, the injuries resulting in immediate death. The shooting was done from ambush.

4. The injuries so sustained were not the result of an accident arising out of the employment of the deceased Harden by the defendant Thomasville Furniture Company.

5. That the deceased, Robert Boozer Harden and his assailant, Odell Bruton, were both employed by the defendant, Thomasville Furniture Company, Bruton working during the day at work disconnected with that performed by Harden as a night watchman during the night.

6. That the shooting of Harden by Bruton was the result of ill will and matters entirely personal to the two men and completely disassociated from the employment of either by the defendant, Thomasville Furniture Company.

7. That at the fall term 1929 Superior Court Davidson County the assailant of the deceased, Harden, was indicted, tried and found guilty of murder in second degree and thereupon sentenced to thirty years imprisonment in the State's prison and at the time of hearing had entered upon service of this sentence.

8. That the assailant, Bruton, was not insane at the time of shooting the deceased.

9. That the deceased Harden's average weekly wages was $24.50.

10. That Amy Harden, widow and A. W. S. Harden, eleven year old son of deceased, Harden were solely dependent upon him at the time of his death.

Upon the foregoing Findings of Fact are based the following

Conclusions of Law

Sub-section J, of Section 2, of the Workmen's Compensation Act provides that death to be the basis for a right to Compensation means only death resulting from an injury; sub-section F of section 2, defines injury to mean only injury by accident arising out of and in the course of the employment.

Section 38 of the act provides for payment of certain compensation to persons wholly dependent upon a deceased employee who met his death as a result of an accident.

Thus the North Carolina Workmen's Compensation Act provides for compensation for accidental personal injuries, resulting in death, that arise out of and in the course of the deceased's employment so, in reaching a decision of this case, the meaning of the phrase "arising out of and in the course of" becomes an important factor.

Inasmuch as our Supreme Court has not been called upon, as yet to define the meaning of this phrase, resort must be had to the interpretation placed thereon in the decisions of the courts of those states having similar acts.

A leading case, much quoted, in which this term, "Arising out of and in the course of the employment" is defined is McNicol's case, 215 Mass., 492, 102 N.E., 697. In this case Chief Justice Rigg says:

"In order that compensation may be due the injury must arise out of and also be received in the course of the employment—neither alone is enough. It is not easy . . . to give comprehensive definition of these words . . . an injury is received, in the course of the employment when it comes while the workman is doing the duty which he is employed to perform. It "Arises out of the employment" when there is . . . a causal connection between the conditions under which the work is required to be done and the resulting injury . . . If the injury can be seen . . . to have been contemplated by a reasonable person familiar with the whole situation . . . then it "arises out of the employment." The causative danger must be peculiar to the work and not common to the neighborhood. It must not have been foreseen or expected but the event must appear to have had its origin in the risk connected with the employment, and to have flowed from that source as a rational consequence."

The McNicol case, *supra*, is relied upon by counsel for defendant in support of the contention that a willful or criminal assault does not prevent the injury from being accidental. We can conceive the shooting of a night watchman with a fact situation that would bring such an injury within the meaning and intent of the phrase "Arising out of and in the course of the employment." The McNicol case, *supra*, was one in which the employee was assaulted by a drunken fellow workman, who was in the habit of drinking to intoxication, was quarrelsome and dangerous and unsafe to his fellow employees, all of which was shown to have been known to the employer, who to use the language of the court "Knowingly permitted him in such condition to continue at work during the day of the fatality—which occurred in the afternoon."

In the present case the facts are entirely different—considering the evidence in connection with the principles expressed in the McNicol case the injury clearly occurred in the course of the employment, while the deceased was performing the duty which he was engaged to perform. The defendants do not contend otherwise. However to be compensable the death must result from an "Accident arising out of the employment."

Death in the instant case clearly was the result of premeditation and deliberation and was consummated with malice and so argued by the plaintiff's counsel. However, the record shows that the presiding judge in the criminal prosecution against Bruton thought differently and would not permit the issue of first degree to go to the jury but directed a verdict of second degree murder and imposed the maximum sentence of thirty years.

In *State v. Miller*, 197 N. C., 449, Chief Justice Stacy, writing the opinion, defines murder, wherein he says: "An unlawful killing with malice is murder in the second degree."

The verdict in this criminal prosecution only finds that constructive malice or ill will existed. However, the record of the proceedings had in the criminal prosecution of Bruton conclusively shows that the homicide was the result of the deceased's, Harden's, attentions to the wife of Bruton thereby disrupting his home and Bruton's fear of bodily harm Harden might inflict upon Bruton; over which situation Bruton had, no doubt, brooded and deliberated for some time. Other than the defense of insanity there is nothing to warrant counsel for defendants in contending that the defense's evidence offered in the criminal proceedings was "born, conceived and manufactured, after the alleged offense."

The plaintiff introduced the evidence of the Police Chief Smith showing that before the homicide Bruton had approached him about the situation existing between Bruton's wife and the deceased, that Bruton feared the deceased because he carried a gun. The entire record is replete with the evidence of actual malice and ill will existing prior to the homicide between the deceased and his murderer—a matter entirely personal to the two men—having no relation whatever to the work either was engaged to perform and with which the work of either could not be associated except for the fact that the hours of work provided the time within which Harden could pursue his amours with Bruton's wife.

It has uniformly been held in those states having provisions in the Workmen's Compensation Act similar to ours, that where the cause of an assault was involved in something personal to the parties and not incident to the employment, the injury resulting from such assault does not "Arise out of the employment" although often occurring "In the course of the employment." See *Jacquenin v. Furniture Co.*, 103 Atl., 115; *Still Wagon v. Callan Bros.*, 170 N.Y.S., 677; *Unim S. M. C. v. Davis*, 115 N.E., 676; *Mountain Ice Co., v. McNeil*, 103 Atl., 184; *De Fillifpis v. Falkenberg*, 155 N.W.S., 761; *Farfper v. Western Electric Co.*, 166 N.W., 857.

Answering the defendant's contention that, notwithstanding, this was a secret, felonious, and deliberate murder this Commission would consider the peculiar position which decedent occupied at the time of the homicide which was an "extra hazardous" risk to which the deceased as a night watchman subjected his person—and award compensation for this death—the reply thereto will be found in *Unim S. M. C. v. Davis*, 155 N.E., 676, in which the Indiana Court said:

"But it excludes an injury which cannot be fairly traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workmen would have been *equally exposed apart* from the employment."

It can be accepted without argument that having aroused the wrath of a jealous man and having given a husband grounds upon which to believe he had invaded the privacy of his home, the deceased was at all time thereafter exposed, both during employment, as well as apart from his employment, equally to the hazard of being shot. Upon the question of the insanity of Bruton at the time of the killing so far as the evidence before the Commission shows, the proof of insanity is insufficient by its greater weight on this issue. This defense failed to impress the jury in the criminal proceedings and the only expert evidence in the present record on this question negatives the issue.

The Commissioner had before him the excellent briefs submitted by counsel and has reviewed the cases cited with much interest in connction with the points discussed.

For the reasons given the Commissioner, therefore, must direct an award to be issued dismissing the claim on the grounds that the injury causing death in this case did not arise out of the employment of the deceased and further that the plaintiff will pay the cost of the hearing.

[Docket No. 38]

COBERT SIMPSON, Employee, Plaintiff, v. CANNON MILLS COMPANY, Self-insurer, Employer, Defendant

Filed November 2, 1929

Hernia.—Opinion in *Hollifield v. Briggs-Shaffner Company*, Docket No. 13, cited with approval. Where section 2 (r) not complied with medical treatment and compensation for hernia denied.

Hearing before J. Dewey Dorsett, Commissioner, at Salisbury, N. C., October 23, 1929.

Plaintiff appeared in person.

Defendant represented by *W. H. Beckerdite*, of the Cannon Mills Company.

Opinion by Dorsett, Commissioner.

Statement of the Case

It is alleged by the plaintiff that on September 6, 1929, while regularly employed by the defendant and while engaged in loading some cases of goods, that he sustained a hernia. The plaintiff was working with two other employees at the time of this alleged accident, and his job was that of pushing a hand truck. The two fellow employees would lift these boxes of goods, and this plaintiff would run the truck under them; the boxes were then "tilted" over on the truck in a balanced position. The plaintiff is contending that while so engaged that a heavy load was "tilted" over on his truck, causing the accident resulting in the hernia complained of. The plaintiff further testifies that at the time of the alleged accident he felt just a small pain and that he did not think much about it at that time, but it seemed to get worse on Saturday and Sunday, and that he went to see a doctor on Monday. This accident is supposed to have happened on Friday afternoon prior to his seeing the doctor on the following Monday. The accident was not reported to his employer, and the plaintiff says that the reason he said nothing about suffering any pain when the loaded truck was shoved over on him was because the pain was so slight that he paid no attention to it.

One D. A. Safrit, a fellow employee working along with this plaintiff, testifies that he and another employee would lift these boxes up and the truck would run under them, and they would then "tilt" these boxes over on the truck. He says the lifting was not heavy, and if any heavy work was being done that he and a fellow employee were doing it, and not the plaintiff. He says that he did not notice anything wrong with the plaintiff on Friday evening; that the plaintiff made no complaint about getting injured; and that he knew nothing about the accident until about ten days afterwards when he saw this plaintiff in a meat market and asked him, "When are you coming back to work?" "He said that he did not think he would ever be any good. I asked him what the trouble was, and he told me about it. That was the first time I knew anything about it." He further testified that the plaintiff had been doing this kind of work for about three months, and that before this plaintiff started on this particular work, that these boxes were loaded by one man. He further testified that if any extra load was shoved over on this plaintiff, that he knew nothing about it, and nothing was said to him about it.

Dr. Buchanan testifies that he examined the plaintiff and found a little hernia, and indicated that it was about the size of the end of the small finger, and he diagnosed it as a slight umbilical hernia. The doctor says that this plaintiff did not tell him at the time he made the examination that he was working for the defendant, but just came to him for an examination; and, of course, the doctor gave him the examination and advised him that he should be operated on, or should bind himself up. Dr. Buchanan further testified that if the hernia complained of was caused by the alleged accident, that it is his opinion that the pain would have been so pronounced that this plaintiff would have known about it and would have, to use his own words, "dropped something, because when that omentum gets out it usually hurts; usually in those cases you can tell something's happened. They knock you mighty near to the ground—just like an inguinal hernia." And the doctor thinks he would have known something about it before two or three days.

Upon all the evidence the Commission finds the following

Findings of Fact

1. That the parties to this case are bound by the provisions of the North Carolina Workmen's Compensation Act.

2. That the plaintiff on September 6, 1929, was regularly employed by the defendant at an average weekly wage of $12.65 a week.

3. That the hernia complained of was not the result of an accident arising out of and in the course of the plaintiff's employment.

Conclusions of Law

Sub-section (r) of Section Two, provides, (1), there must be an injury resulting in hernia, or rupture; (2), that the hernia or rupture appeared suddenly; (3), that it was accompanied by pain; (4) that the hernia or rupture immediately followed an accident; (5), that the hernia or rupture did not exist prior to the accident for which compensation is claimed.

The Commission is of the opinion that neither of these requirements is met by the evidence in this case. In *Hollifield v. Briggs-Shaffner Company*, the Commission said, "Hernia will only be considered accidental under the North Carolina Workmen's Compensation Act, where there is real traumatic hernia resulting from the application of force directly to the abdominal wall, either puncturing or tearing the wall. All other cases will be considered as either congenital, or of slow development, being a disease rather than an accidental injury, unless conclusive proof is offered that the hernia was caused by sudden effort or strain. In all claims for compensation for hernia with incident medical and hospital treatment, the burden of proof is upon the claimant to establish the requirements as set out in Sub-section (r) of Section 2. Upon failure of the claimant to establish any one of the requirements, the Commission will deny compensation."

Upon consideration of all the evidence, it is ordered that an award be issued denying compensation and medical treatment. Each side of this case will pay its own costs.

Vol. I Pages from 139 to 192

ADVANCE SHEETS

OF

OPINIONS IN CASES

HEARD AND DETERMINED
BY THE

NORTH CAROLINA INDUSTRIAL COMMISSION

RALEIGH

JANUARY, 1930

OPINIONS TO JANUARY 1

SUBSCRIPTION PRICE $5.00 PER YEAR
IN ADVANCE

PUBLISHED FOR THE COMMISSION
BY
EDWARDS & BROUGHTON COMPANY
RALEIGH, N. C.

Admission applied for as second-class matter November 12, 1929,
at the post-office at Raleigh, North Carolina,
under the Act of March 3, 1879.

PUNCHED TO FIT BINDER SUPPLIED BY EDWARDS & BROUGHTON COMPANY, RALEIGH

INDEX

Case *Page*

Dan Moore, Deceased, et al. *v.* Carolina Coal & By-Products Company.... 139
Joe C. Stewart *v.* M. M. and M. D. Tew.... 140
B. W. Howard *v.* Caswell Cotton Mill et al.... 141
Dan A. Peak, Deceased, et al. *v.* City of Salisbury et al.... 142
Walter F. Griffin, Deceased, et al. *v.* McLellan Stores et al.... 144
Eli H. Johnson *v.* Mt. Airy Mantle & Table Company et al.... 150
Dewey Bumgardner *v.* Mt. Airy Furniture Company et al.... 151
Paul Collins et al. *v.* Wayne Tire Company et al.... 152
W. A. Sorrell *v.* Brogden Motor Company et al.... 153
Ben Duke Hill *v.* Southern Fire Insurance Company et al.... 155
R. W. Hodges, Deceased, et al. *v.* Southern Public Utilities Company.... 156
S. Earl Cobb *v.* Odell Hardware Company et al.... 158
Max. R. Kelly *v.* Select Tire Service Company et al.... 161
Belton Blackwell *v.* Winston-Salem Chair Company et al.... 163
James Peppers, Deceased, et al. *v.* Wiggins Drug Stores, Inc., et al.... 164
Ernest Crowder *v.* Carolina Mineral Company et al.... 170
Gurney Meredith *v.* High Point Furniture Company et al.... 171
Hettie H. Smith, Administratrix et al. *v.* Carolina Power & Light Company.... 172
Rosabell Smith, Deceased, et al. *v.* Collins & Aikman Corporation et al.... 175
Mrs. Hallie Johnson *v.* Tar Heel Mica Company et al.... 177
W. A. Logan, Deceased, et al. *v.* Elliott Building Company et al.... 179
Prentis Manning *v.* Southern Dairies, Inc., et al.... 180
W. C. McQuay *v.* McClaren Rubber Company et al.... 181
J. H. Lewis *v.* City of High Point et al.... 184
W. L. Stansbury *v.* W. A. Harmon et al.... 186
Eva Fetherson *v.* The New Way Laundry et al.... 188
Fred Mills *v.* Transylvania Tanning Company et al.... 189

NORTH CAROLINA INDUSTRIAL COMMISSION

MATT H. ALLEN, CHAIRMAN
J. DEWEY DORSETT
T. A. WILSON
COMMISSIONERS

E. W. PRICE, SECRETARY

ELEVENTH FLOOR RALEIGH BANK & TRUST BUILDING
RALEIGH, N. C.

[Docket No. 112]

DAN MOORE, Deceased, Employee; MRS. P. M. MOORE, Widow, et al., Plaintiffs, v. CAROLINA COAL & BY-PRODUCTS COMPANY, Defendant (No Insurance)

Filed December 7, 1929

NON-INSURER.—Claimants electing to accept compensation where employer has neither rejected the act nor provided insurance, award for compensation made for commuted amount to be paid into office of Clerk Superior Court, otherwise penalty will accrue.

Hearing before J. DEWEY DORSETT, Commissioner, in Sanford, Lee County, N. C.

Gavin & Teague representing plaintiffs.

Mr. C. M. Reeves representing employer, defendant.

Opinion by DORSETT, Commissioner.

Statement of the Case

Dan Moore, deceased, was an experienced miner, regularly employed by the Carolina Coal and By-Products Co., of Sanford, N. C., R.F.D. No. 4. On August 28, 1929, while engaged in the performance of his duties with the defendant employer he was accidentally killed. His widow and children, who are the claimants, are asking for compensation as provided by the North Carolina Workmen's Compensation Act. This hearing was requested by counsel for the claimants because no agreement to pay compensation has been offered the claimants by the defendant.

From the evidence the Commissioner makes the following

Findings of Fact

1. The deceased, Dan Moore, was a regular employee of the defendant, and on August 28, 1929, he was accidentally killed; the said accident resulting in death arose out of and in the course of his employment.

2. The deceased was bound by the provisions of the North Carolina Workmen's Compensation Act, not having rejected the same. The defendant employer, Carolina Coal and By-Products Co., is presumed to be operating under the act, and it is found as a fact that they are operating under the act, but have not complied with the insurance provisions of the said Compensation Act.

3. The average weekly wage is $18.00.

4. Mrs. P. M. Moore and six minor children were at the time of the accident wholly dependent upon the deceased, and are entitled to receive the compensation due them under the terms of the Compensation Act.

5. The claimants have elected to be bound by the provisions of the Compensation Act, rather than sue at common law.

Conclusions of Law

First, as a matter of law, both the employer and the employee were presumed to have accepted the provisions of the North Carolina Workmen's Compensation Act, and were bound by it. Second, the rights and remedies granted to the employee by that Act, excluded all other rights and remedies at common law, or otherwise. Under the provisions of the Compensation Act, the employer had an election and choice as to whether or not he would operate his business under the Compensation Act, and either protect his employees by carrying insurance, or satisfy the Industrial Commission of his own financial ability to pay compensation to his employees when due. He did not carry such insurance, nor did he satisfy the said Commission of his own ability to pay compensation to his employees. Under such circumstances the claimants had an election; they could ask for an award of compensation according to, or under the provisions of the said act, or they could sue at law for damages, in which latter case the employer is deprived of certain defenses. In the instant case the claimants are asking for an award under the Compensation Law, and the following award is ordered.

Award

The defendants will pay to Lydia Moore, widow, Stanford, Gerta, Graham, D. A., Jr., Calvin and Ernest Moore, minor children, each of whom were wholly dependent upon the deceased employee, compensation at the rate of $10.80 per week, for a period of 350 weeks from August 28, 1929, plus funeral expenses not to exceed $200.00, and any medical bills incurred.

The above weekly payments are to be commuted to a lump sum upon the finding that it will be to the best interests of the dependents named and will not work a hardship upon the defendants, provided such lump sum payment is made within seven days and as prescribed below the Commission will not take steps to collect the penalties prescribed in Section 68 (b) of the Workmen's Compensation Act; otherwise, steps to collect approximately $3,150.00 the penalty now due under this Section will be taken for the defendant's failure to provide insurance as required by the act and not having rejected the act.

The lump sum payment of the commuted amount of future installments of compensation provided herein in the amount of $3,221.90 to be paid within seven days of the date hereof into the office of the Clerk of the Superior Court of the County of Lee, to be held by said Clerk for further direction and orders of this Commission as to the appointment of a trustee to administer said funds for the use and benefits of the dependents named above.

The defendants will pay the costs of this hearing.

[Docket No. 109]

JOE C. STEWART, Employee, Plaintiff, v. M. M. and M. D. TEW, Employers, Defendants, Non-Insurance

Filed December 6, 1929

Jurisdiction.—Where evidence shows less than five employees Commission will deny jurisdiction.

Opinion by Dorsett, Commissioner.

Statement of the Case

The claimant, Joe C. Stewart, received an injury to his eye that has resulted in some loss of use of the injured member.

He has not been offered an agreement concerning compensation by his employers, M. M. and M. D. Tew.

The claimant contends that he was employed by the defendants to sharpen certain blades in connection with their cotton gin; that he and two of his sons did this work; and that while in the employment of the defendants he received the injury to his eye, and for that reason he is entitled to compensation as provided in the North Carolina Workmen's Compensation Act.

The defendants on the other hand contend that they are not liable on the following grounds: First, they are not subject to the provisions of the Compensation Law because they do not have in their employ and have not had since July 1, 1929, five employees. Second, they contend that if they were subject to the provisions of the Compensation Act, that they are not liable because the plaintiff is an independent contractor.

Findings of Fact

1. There is no evidence that the defendants have at any time since July 1 had in their employ as many as five employees, and they are therefore not subject to the provisions of the North Carolina Workmen's Compensation Act.

Conclusions of Law

The hearing Commissioner does not think it necessary to go into the other contentions of the plaintiff, since finding as a fact that the defendants are not subject to the provisions of the North Carolina Workmen's Compensation Act, and therefore, this Commission has no jurisdiction. The case is dismissed.

[Docket No. 90]

B. W. HOWARD, Employee, Plaintiff, v. CASWELL COTTON MILL, Employer, and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Carrier, Defendants

Filed December 7, 1929

Temporary Total Disability.—Award will be made consonant with facts found upon hearing.

Hearing was held at Kinston, N. C., before J. DEWEY DORSETT, Commissioner, at 2:30 p.m.

B. W. Howard is present represented by the law firm of *Williams & Stroud. Mr. Williams* appearing.

The American Mutual Liability Insurance Company is represented by their agent, *Mr. Anderson.*

Opinion by DORSETT, Commissioner.

Statement of the Case

B. W. Howard, the claimant in the instant case, requested a hearing because he was not satisfied that his employer and insurance carrier had complied with the provisions of the North Carolina Workmen's Compensation Law, contending that he was entitled to compensation for a longer period than the agreement tendered him called for. From the evidence the hearing Commissioner makes the following

Findings of Fact

1. B. W. Howard, employee, was injured on July 31, 1929, the said injury arising out of and in the course of his employment. The parties are bound by the North Carolina Workmen's Compensation Act. The average weekly wage is $12.60.
2. The claimant was injured on the 31st of July, and was able to return to work on the 19th of August.
3. The defendants have paid to the claimant, $9.70 compensation, before this hearing.

Conclusions of Law

The claimant, B. W. Howard, is entitled to receive compensation at the rate of sixty per cent of $12.60 per week, from July 31, to August 19, less the seven-day waiting period, and all hospital and medical bills incurred because of the accident; and it is ordered that the defendants pay compensation and the said bills, less the $9.70 already paid as compensation. Each side will pay its own costs.

[Docket No. 91]

DAN A. PEAK, Employee, deceased, et al., v. CITY OF SALISBURY, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed December 6, 1929

DEPENDENTS.—ILLEGITIMATE CHILD.—An illegitimate child acknowledged as dependent at time of death entitled to compensation as being wholly dependent.

Hearing before Commissioner J. DEWEY DORSETT, at Salisbury, N. C., December 2, at 11:00 a.m.

Lela Peak, widow of Dan A. Peak, appears in person, along with Myrtle Tate Peak. They are not represented by counsel.

A. McC. Faucette, Attorney, of Columbia, S. C., is counsel of record for the dependent children of the deceased in South Carolina.

Opinion by DORSETT, Commissioner.

Statement of the Case

Dan A. Peak was regularly employed by the City of Salisbury. While so employed, and on October 8, 1929, he received an injury resulting in death almost instantly. The City of Salisbury, the employer, and the Maryland Casualty Company, the carrier, are not denying liability in the instant case. It is admitted that the parties to this case are bound by the provisions of the North Carolina Workmen's Compensation Law; that the deceased was regularly employed; that he accidentally received an injury on October 8, 1929, and that the said injury arose out of and in the course of his employment and resulted in his death. It is also admitted that the average weekly wage being earned by the deceased at the time of his death was $13.75 per week. This hearing was requested by the carrier and the City of Salisbury to determine who the dependents in the instant case are.

From all of the evidence, the hearing Commissioner makes the following

Findings of Fact

Dan A. Peak was accidentally killed on October 8; the accident resulting in death arose out of and in the course of his employment; the average weekly wage was $13.75; the parties to this cause are bound by the provisions of the North Carolina Workmen's Compensation Act; the Maryland Casualty Company is the insurance carrier.

2. The deceased leaves a widow, Lela Tate Peak, and an illegitimate but acknowledged dependent child, Myrtle Tate Peak, who at the time of his death were wholly dependent upon his earnings for support.

3. Four children, all above the age of 21, by a former wife, appeared at the hearing, claiming the benefits of the Compensation Act and denying the right of Lela Tate Peak and Myrtle Tate Peak to receive the benefits of the said Act. It is found from the evidence that the first wife of the deceased has been dead for a number of years, and died prior to the marriage of Dan Peak to Lela Tate Peak; that the deceased had not supported any of his children by his first wife for several years; that all of the children by his first wife are more than 21 years of age.

Conclusions of Law

A widow or child is conclusively presumed to be wholly dependent for support upon a deceased employee. It is clear that under our law Lela Tate Peak is conclusively presumed to be wholly dependent. Myrtle Tate

Peak is the daughter of Lela Tate Peak, but the deceased is not the father of Myrtle Tate Peak. The evidence is convincing, however, that the deceased acknowledged Myrtle Tate Peak as his own and for eight years has supported her as his own child, and under our law this acknowledged but illegitimate child is wholly dependent.

Award

The defendants, the City of Salisbury and Maryland Casualty Company, carrier, will pay to the dependents Lela Tate Peak and Myrtle Tate Peak, compensation as provided under Section 38 of the North Carolina Workmen's Compensation Law; that is, the defendants are ordered to pay compensation at the rate of $8.25 per week for a period of three hundred and fifty weeks, and funeral expenses not to exceed $200.00. Any medical bills incurred will also be paid by the defendants.

Myrtle Tate Peak, a minor, is entitled to receive one-half of $8.25 per week, and Lela Tate Peak is entitled to receive one-half of $8.25 per week. The share going to Lela Tate Peak will be paid direct to her. The share going to Myrtle Tate Peak is ordered paid to the North Carolina Bank & Trust Company of Spencer, N. C., as trustee. If it is more convenient for the insurance carrier to pay the share going to the minor dependent in a lump sum, this may be done; otherwise, they are ordered to pay to the said North Carolina Bank and Trust Company, trustee, the share belonging to Myrtle Tate Peak in monthly installments.

It is further ordered that the defendants pay the cost of this proceeding.

[Docket No. 45]

WALTER F. GRIFFIN, Deceased, Employee; W. B. GRIFFIN, SELMA GRIFFIN, JOHN D. GRIFFIN, THOMAS S. GRIFFIN, Plaintiffs, v. McLELLAN STORES, Employer, and AMERICAN EMPLOYERS INSURANCE COMPANY, Carrier, Defendants

Filed December 12, 1929

DEPENDENCY.—Mother of deceased son entitled to 60 per cent of amount contributed weekly by the deceased to support the dependent mother with no deductions for spending money given deceased by the mother.

DEPENDENCY.—Inquiry should include question of whether contributions from workman were looked to, depended or relied upon in whole or in part by the family for means of support.

Hearing before J. DEWEY DORSETT, Commissioner, at Winston-Salem, N. C., November 7, 1929.

Plaintiffs represented by *Fisher & Jones*, of High Point, N. C.

Defendants represented by *Messrs. Carlyle* and *Dreher*, of the law firm of *Manly, Hendren & Womble.*

Opinion by DORSETT, Commissioner.

Statement of the Case

Fulmer Griffin, the deceased, was on the 20th of July, 1929, and for some time prior to that date, employed by the McLellan Stores of Winston-Salem, N. C. The evidence discloses the following facts: That he was about nineteen years of age; that his job with the store above mentioned was that of stock clerk, but in addition to his official duties as stock clerk he was called upon from time to time to perform other duties about the store for his employer; and that he was a regular employee. The defendants at the beginning of this hearing read into the record the following admission: "We admit that the deceased was employed by the McLellan Stores as stock clerk. We also admit that the deceased, Fulmer Griffin, was about nineteen years of age, and was employed as stock clerk by the McLellan Stores in Winston-Salem; that on the night of July 20, 1929, at about 7 p.m. a negro woman by the name of Sarah McMillan was seen stealing goods from the McLellan Stores; that the deceased was told by the assistant manager in charge of employees to follow the woman while the assistant manager called a policeman. The deceased followed the woman some distance, and overtook her on the street at the point of intersection of Fifth and Liberty Streets, grabbed her by the arm, and seized and took from her the pair of hose which had been taken from the store. During the encounter, which occurred some distance from the store, the deceased was stabbed, from which injury he died." It is admitted further that the average weekly wage was $19.00.

The questions to be determined are three in number; first, did the accident arise out of and in the course of the employment; second, who are the dependents; third, what amount of compensation shall be paid to the dependents.

Mr. C. M. Smith, manager of the McLellan Stores of Winston-Salem, and the employer of the deceased, speaks of the duties of the deceased in these words: "When we would get in fresh goods, he received them, opened them, and checked them, and part of the time he was down on the floor—he was stock clerk and assistant floor man; he was in training there and that is the routine—the duties of a floor man are keeping up the store and protecting the property of the McLellan Store—everything that would pertain to the proper running of the store."

The evidence discloses the facts that at the time of the deceased's death and for more than three months prior to that time the deceased had been supporting his mother and assisting her and his father in the support of the family. The evidence is clear that at the end of each week the deceased turned over to his mother, who apparently was the business head of the family, his entire week's earnings, and with this help from the deceased the mother, by taking in roomers, supported the family consisting of herself, her husband, and two or three minor children. From the evidence of the employer, young Griffin was a trusted employee, and was making good with the McLellan Stores. They were training him for a better job. From the evidence it appears that the deceased was economical in his spending. He worked hard, the evidence disclosing that most every night he would work until 10 or 11 o'clock. He quit school when he was fifteen years of age because he realized that his mother depended upon him, and that it was necessary that he work and make some money to help support her and the family. Th family needed this money and he realized it. The mother of the deceased testifies that at the end of each week he would give her all of his earnings; that when he needed clothes the two of them would go together to purchase them; that she carried the money and always acted as treasurer; that she had some roomers; and that with her son's help she managed to get along.

W. C. Griffin, the father of the deceased, is living, and at the time of the accident was employed by the Dixie Life Insurance Company and was earning less than $25.00 per week. It seemed that he was working on a salary of $15.00 per week and commission that would amount to about $5.00 a week.

From all the evidence the Commission arrives at the following

Findings of Fact

1. On July 20, 1929, the deceased while regularly employed by the defendant employer at an average weekly wage of $19.00, was accidentally killed by being stabbed by some deadly instrument in the hands of a colored woman by the name of Sarah McMillan; the accident resulting in death arose out of and in the course of the employment of the deceased.

2. The deceased was nineteen years of age, was unmarried, and left no dependents that are conclusively presumed to be dependent.

3. From the evidence it is found as a fact that the mother of the deceased, Mrs. W. B. Griffin, was at the time of the fatal accident and for more than three months prior thereto partially dependent, but to the extent of $19.00 per week, on the earnings of the deceased for the support of herself and small children; it being clear from the evidence that the mother in the instant case is the responsible head of the family, and the financial affairs of the family were attended to by the mother.

4. The parties, plaintiff and defendants, are bound by the provisions of the North Carolina Workmen's Compensation Law of 1929.

5. The American Employers Insurance Company is the insurance carrier.

Conclusions of Law

The defendants deny liability, in the first place, because they contend that the accident did not arise out of and in the course of the employment, as required by Section 2 (f) of the Compensation Law, and the accident is therefore not a compensable one under the said law.

This Commission in other cases coming before it has undertaken to define what the terms "arising out of" and "in the course of," mean; and in the case of *Southern v. The Morehead Cotton Mills Co.*, has said that the words "out of" point to the origin or cause of the injury, and the words "in the course of" to the place and circumstance under which the accident or injury takes place. The former words are descriptive of the character or quality of the accident, and the latter words relate to the circumstance under which the accident of that character or quality takes place. The character or quality of that accident as conveyed by the words "out of" involves the idea that the accident is in some sense due to the employment and must result from a risk reasonably incident to the employment.

"It has been repeatedly observed that if an accident arises out of the employment it ordinarily arises in the course of it, but the converse is not true; an injury may occur in the course of the employment and yet not arise out of it. 'Arising out of' does not mean the same as 'in the course of,' but the expressions in the act impose a double condition. The words 'in the course of the employment' relate to the time, place and circumstances under which the accident takes place, and an accident arises in the course of the employment when it occurs within the period of the employment, at a place where the employee may reasonably be in the performance of his duties and while he is fulfilling those duties or engaged in something incidental thereto. The words 'arising out of the employment' refer to the casual connection between the employment and the injury." *New Amsterdam, etc., Co. v. Summerell* (Ga.), 118 S.E. 786.

The deceased at the time of the accident was serving as a floor man—the title of his occupation implies many duties devolving upon one engaged in such an occupation. It can be fairly inferred from common knowledge of such an occupation that a floor man is charged among other things with the duties of preserving his employer's property. The Compensation Act does not penalize an employee for using bad judgment in the performance of his duties or acting heedless of his own person in an emergency while looking after his employer's property, nor is compensation denied because of his negligence. The deceased in the instant case was doing nothing other than the duties he was due his employer at the time of the accident. In fact, he was carrying out the instructions of the assistant manager at the time he met with the fatal accident. It seems to us that the accident arose out of his employment. In the instant case this deceased, if we are to believe the manager of the store, was charged among other things with looking after the property of the McLellan Stores. He was on duty as a floor man at the time the colored woman was detected "shop lifting," and received orders from the assistant manager to follow the woman while he, the assistant manager, went for a policeman. The deceased overtook the woman and took from her the stolen hose, and when he did this he was fatally injured. No doubt the deceased used bad judgment in seizing the stolen property for his employer, but we do not think he went beyond the scope of his employment in so doing. Does not the order "follow her" carry with it the implied order to repossess the goods if you overtake her? We think it does.

The second and third questions raised will be considered together. Who is the dependent in the instant case, and what amount is that dependent entitled to receive? Dependency being a question of fact, at least until the facts are found, and the facts are as varied as the number of cases, each must be decided on its own merits. In this case who has suffered in respect to his or her support or maintenance, and what is the extent of that loss? The greater weight of the evidence is that the deceased contributed or turned over to his mother his entire weekly wage in the amount of $19.00 each week. His mother was the treasurer, she handled the money, and it was she who paid the bills and ran the home. It is in evidence that the mother gave her deceased son on an average about $4.00 per week as spending money; that the clothing for the deceased was purchased out of the family funds; and that the deceased lived in the home of his parents and paid no board. The insurance carrier contends that these facts should be taken into consideration and that an amount should be deducted from the $19.00 turned over to his mother to take care of the items above mentioned. The defendants further contend that the mother has a husband who is able to earn for the family a livelihood, and that at the time of the accident the mother was taking roomers, and for these reasons total dependency does not exist. These facts have been taken into consideration, and this Commissioner is of the opinion that a claim of dependency is not to be defeated by mere proof that the claimant can be by the exercise of his or her best endeavors support him or herself and family by their own unaided efforts; but, to sustain an award to parents for the death of a son, there must be a showing made of actual support by the son at the time of the accident and for three months prior thereto. In the instant case the showing has been made and the proof is sufficient to establish the fact that the mother was dependent on her deceased son to the full extent of the earnings of the said son.

The parents of the deceased contend that they are entitled to full compensation, or 60 per cent of $19.00, for a period of three hundred and fifty weeks, to have all the hospital and medical bills paid, and to receive funeral expenses not to exceed $200.00, as provided by the Compensation Law. In the first place, the defendants deny this dependency and say that the amount the deceased turned over to his mother was for payment of his own board; and in the second place, that if the mother is dependent she is not entitled to full compensation.

We are faced with questions involving the dependency of a mother on the earnings of a minor son for the support of herself and family. The Workmen's Compensation Act now in force in this State makes certain provisions for dependents, but does not undertake to define dependency other than to say that a widow, a widower, and/or a child shall be conclusively presumed to be wholly dependent for support upon the deceased employee. We find this in Section 39. That Section further provides, "In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the facts as the facts may be at the time of the accident." It will be found that the father or mother of a minor son is not included in any of the classes in which dependency is conclusively presumed by the terms of the act. The fact of dependency on the earnings of such son, and the degree thereof, must therefore be determined in accordance with the existing facts at the time of the accident. The meaning of the word "dependency" when used in compensation and liability acts has been frequently considered by various courts, and it has been uniformly held that want or distress need not exist before it can be said that the condition of dependency arises, and that the parent or his family need not reduce their expense of living below a reasonable standard in order to escape dependency and thereby absolve an employer from payment of compensation who would otherwise be liable for the payment thereof. *Dazy v. Appanaug*, 36 R. I. 81, 89 Atl. 160. *Matter of Rhyner v. Huber Building Co.*, 171 App. Div. 56, 156 N. Y., Supp. 903. Honnold on Workmen's Compensation p. 70. Bradbury on Compensation, page 315. In harmony with this and the authorities cited in support thereof, the Appelate Court of the State of Indiana in the case of Carroll 116 N.E. 844, has this to say: "To confine the inquiry to the question of whether the family of the deceased workman could have supported life without any contribution from him, or whether such contributions were absolutely necessary in order that the family might reasonably be maintained, is not a fair test of dependency; but, the inquiry should include the question of whether contributions from the workman were looked to, depended or relied upon in whole or in part by the family for means of support." *Howells v. Vivian*, etc., 85 L.T. 529. *Appeal of Hotel Bonding Co.*, 89 Comm., 143, 93 Atl., 245.

Following the rule thus laid down, it seems clear to this Commissioner that the word "dependent" as used in the North Carolina Workmen's Compensation Act should be given a meaning broad enough to include the reasonable needs of a parent in the proper support of himself and his dependent family.

The matter of whether or not an applicant in any given case is entitled to compensation as a dependent must necessarily be determined from the circumstances disclosed by the evidence. The evidence in the instant case is clear that the weekly contributions made by the deceased son to his mother were used and required for the support of that mother and her family.

Now concerning the question as to how much the dependent mother is entitled to, this Commissioner is of the opinion that the said mother is entitled to receive 60 per cent of the amount that was contributed weekly by her deceased son. Our Act recognizes two classes of dependents; that is, those wholly dependent and those partially dependent. The facts in the instant case show that the father was working and that the mother was taking roomers, but the facts also show that the deceased son contributed $19.00 per week, his entire earnings, to his mother, and that this went into a family fund and was used for the support of the entire family. Therefore, this Commissioner concludes that the mother was only partially dependent upon the contributions made by the deceased son from his earnings. Section 38 of the North Carolina Workmen's Compensation Act provides that compensation to be received by such partial dependents shall equal the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of his injury. The evidence shows that out of the family funds composed of the earnings of the father, son, and mother, the mother supported the whole family, provided a home, clothes and food for the deceased son and turned over to him on an average of $4.00 a week for spending money. Shall the cost of the maintenance of such deceased son be deducted from the earnings contributed by him to his mother for the support of the family in determining the amount of compensation to which such mother is entitled as a partial dependent? From a study of the Act and the authorities in other jurisdictions, this Commissioner is led to the conclusion that such deduction should not be made.

The contention of the defendants that it is unjust to allow compensation to a dependent parent based on the earnings contributed by a minor son where the dependent parents support such son without deducting the cost of such support, seems logical, but our law does not purport to provide a method to determine the actual loss sustained by such parent and require full compensation for such loss, but only assumes to affix an arbitrary amount that shall be paid such parent as compensation based on such son's annual earnings and contributions therefrom to such dependent parent; it is, therefore, clear that there is no basis for such contention. There certainly is no provision in the North Carolina Act for any such deduction and no language from which such requirement can be inferred, hence this Commissioner concludes both by reason and authority that the cost of the maintenance of a contributing minor son should not be considered in determining the amount of compensation to which a dependent mother is entitled. In arriving at the amount of compensation due the dependent, this Commissioner believes that the deduction of the son's support is not authorized, and we need only apply the rule laid down in Section 38 of our Act to determine the amount of such compensation. Under this rule the dependent mother should receive for a period of three hundred and fifty weeks that proportion of what she would have received had she been wholly dependent, as to what she actually received from her deceased son bears to her son's annual earnings at the time of his death. As the mother was receiving all of her deceased son's earnings at the time of his death, or 100 per cent thereof, it follows that she will be entitled to receive 100 per cent of what she would have received had she been wholly dependent. In other words, there is no difference in the amount a total dependent and a partial dependent is entitled to receive, under such Section, where such partial dependent receives all of the earnings of such injured employee. The following Award is therefore made:

Award

In this case the average weekly wage of the son at the time of his death was $19.00, all of which he contributed to his partially dependent mother. It is therefore ordered that the defendants pay to the mother of the deceased weekly compensation of 60 per cent of $19.00, or $$11.40, for a period of 350 weeks, the same as she would have been entitled to receive had she been wholly dependent. The defendants are further ordered to pay funeral expenses not to exceed $200.00, to pay all medical and hospital expenses incurred, and to pay the costs of this proceeding.

[Docket No. 78]

ELI H. JOHNSON, Employee, Plaintiff, v. MT. AIRY MANTLE AND TABLE COMPANY, Employer, and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Carrier, Defendants

Filed December 14, 1929

SECOND INJURY.—Where second injury result of first compensation allowed for second injury.

Plaintiff represented by *D. L. Hiatt*, Attorney, Mount Airy, N. C.

Opinion by WILSON, Commissioner.

This hearing was held to determine if plaintiff's disabilities have terminated. Said disabilities were caused by, first, the dropping of a heavy package of veneer on his left foot, mashing toes and foot; second, as a result of said injury plaintiff's foot was in a cast, causing him to use crutches, and on August 23, 1929, the crutches said plaintiff was using, while walking on the back steps going to the outhouse, slipped, resulting in the breaking of his right forearm.

The Commission found that the second injury was the result of the first, and therefore the plaintiff is entitled to compensation from July 26, 1929, until November 26, 1929, the date of hearing, at the rate of $8.25 per week, plus medical and hospital treatment to date.

The disabilities to terminate as of date of hearing, November 26, 1929.

[Docket No. 85]

DEWEY BUMGARDNER, Employee, Plaintiff, v. MT. AIRY FURNITURE COMPANY, Employer, and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Carrier, Defendants

Filed December 14, 1929

VISION.—Where proof does not establish loss of vision as result of accident, not compensable.

Plaintiff represented by *Mr. E. C. Bivens*, Attorney, Mount Airy, N. C.

Opinion by WILSON, Commissioner.

Summary of the Case

Plaintiff contends in this case that he suffered an injury to his right eye on July 5, 1929, and as a result of said injury has lost all vision in said eye. Plaintiff testified the injury was caused by particles flying from revolving sandpaper used in cabinet making. A fellow employee testified he removed something from plaintiff's eye on July 5, 1929.

Four medical doctors testified that blindness was not the result of said accident, but existed prior to accident. Neither an infection nor a scar were present. One doctor testified there was a cloudy vitreous; another said there were no lacerations.

Upon all the evidence in this case, the Commission makes the following

Findings of Fact

1. That plaintiff and defendant have accepted the Compensation Act.

2. That plaintiff received a slight accidental injury to his right eye on July 5, 1929, which arose out of and in the course of his regular employment while employed by the defendant employer.

3. That plaintiff did not lose the vision in his right eye as the result of said accident.

4. That plaintiff was able to return to work July 10, 1929.

5. That plaintiff's average weekly wage is $13.12.

Upon the foregoing findings of fact, the Commission bases its

Conclusions of Law

1. That plaintiff is not entitled to compensation under Section 31 (q) and (t).

2. That medical bills have been paid, and, therefore, the case is dismissed.

The cost in this case shall be charged against the plaintiff.

[Docket No. 88]

PAUL COLLINS, Employee, et al., Plaintiff, v. WAYNE TIRE COMPANY, Employer, and TRAVELERS INSURANCE COMPANY, Defendants

Filed December 18, 1929

DEPENDENCY.—Parents partially dependent upon deceased entitled to same proportion of weekly payments for benefit of persons wholly dependent as the amount contributed by the employee bears to annual earnings of deceased at time of injury.

Hearing before J. DEWEY DORSETT, Commissioner, at Goldsboro, N. C., on December 3, 1929.

Hon. Kenneth C. Royall is present, representing the Claimant.
The Employer, through his Agent, is present.
The Insurance Carrier is represented by their agent, *Mr. Lee Collier.*

Opinion by DORSETT, Commissioner.

Statement of the Case

Paul Collins was employed by the Wayne Tire Company of Goldsboro, N. C. During the course of his employment, he was fatally injured on September 7, 1929. The defendant admits that the accident resulting in the death arose out of and in the course of his employment. It is also admitted that all the parties to this proceeding are bound by the provisions of the Compensation Law. There are two questions to be determined; first, the average weekly wage of the deceased; second, the dependents, if any, and how much they are entitled to receive under the Compensation Act.

Findings of Fact

1. The deceased sustained a fatal accident that meets with the requirements of Section 2 (f) of the Compensation Law.

2. The Insurance Carrier is the Travelers Insurance Company, and that company has intervened as a party defendant.

3. The average weekly wage was $18.21.

4. The parents of the deceased, Mr. and Mrs. Jessie L. Collins, are found to be partially dependent on the earnings of the deceased and this dependency is found to be $14.00 a week.

Conclusion of Law

Under the North Carolina Compensation Act, certain dependents, namely a widow, a widower, and/or a child shall be conclusively presumed to be wholly dependent for support upon the deceased employee. In all other cases question of dependency, in whole or in part, shall be determined in accordance with the facts as the facts may be at the time of the accident. In the instant case it has been found as a fact that the parents of the deceased were partially dependent to the extent of $14.00 a week upon the earnings of the deceased at the time of the accident. At the time of the accident the deceased had no dependents that were wholly dependent upon his earnings. Section 38 provides that where the employee leaves dependents only partly dependent upon his earnings for support at the time of the injury, the weekly compensation to be paid, as aforesaid, shall equal the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of his injury.

Award

The defendants will pay compensation to the dependents, Mr. and Mrs. Jessie L. Collins, at the rate of $8.39 per week for a period of three hundred and fifty weeks. The defendants will pay any medical or hospital bills incurred and funeral expenses not to exceed $200.00. Concerning the cost of this hearing, each party will take care of its own.

[Docket No. 132]

W. A. SORRELL, Employee, Plaintiff, v. BROGDEN MOTOR COMPANY, Employer, and FIDELITY AND CASUALTY COMPANY, Carrier, Defendants

Filed December 18, 1929

BARBECUE.—There must be some causal connection between the accident and job. Where employer's business is selling automobiles and plaintiff was injured while attending barbecue given by employers, accident does not arise out of employment.

Hearing before J. DEWEY DORSETT, Commissioner, in Hearing Room of the North Carolina Industrial Commission.

W. A. Sorrell, Plaintiff, was not represented by counsel.
L. S. Harris represented the Insurance Carrier.

Opinion by DORSETT, Commissioner.

Statement of the Case

The evidence in this case discloses that it is the custom each year for the employer to give a barbecue for his employees. In the year 1929 on the 22d day of August, the employer invited all of his employees. The place where the barbecue was held is some eight miles from the city of Raleigh. The barbecue was held during the working hours of some of the employees in attendance. There was no deduction of wage for the time lost for the barbecue. The records are silent as to the purpose of the barbecue other than its being the annual custom for the employer to give this barbecue for his employees. The injured employee in the instant case testifies that no sales promotion talks were made or any business attended to for the employer out at the place where the barbecue was given.

The plaintiff attended this barbecue in an automobile furnished by his employer. On the return from the barbecue back to his work in the city of Raleigh, this plaintiff was in an automobile wreck and was injured, causing total disability for a period of three weeks. At the time of the accident, the plaintiff was earning in excess of $30.00 a week.

The defendant denies liability on the ground that the accident did not arise out of and in the course of employment. From all the evidence the Commission arrives at the following facts:

1. The parties, plaintiff and defendants, are bound by the provisions of the Compensation Act of 1929.

2. The plaintiff is a regular employee of the defendant and at the time of the accident was earning in excess of $30.00 a week.

3. The accident resulting in the injury, causing this plaintiff's disability, did not arise out of and in the course of employment.

Conclusions of Law

In the instant case by no stretch of the imagination can this Commission conclude that the plaintiff's accident arose out of his employment. Section 2 (f) of the Compensation Law requires that an accident to be compensible must arise out of and in the course of employment. True it is that the plaintiff was using an automobile furnished by the employer at the time of the accident. The employer gave a barbecue and invited all of his employees. For some of these employees it was after their working hours. For the plaintiff it was during his working hours, the evidence disclosing that this plaintiff worked until nine o'clock each evening, and of course the accident did occur during his working hours, but to be compensible under the North Carolina Workmen's Compensation Law this Commission is of the opinion that there must be some causal connection between the accident and the job. Had this plaintiff received his injury while on an errand for his employer or while using the streets of the city or the highways of the state trying to sell an automobile, another question would be presented. The business of the employer is selling automobiles, not giving barbecues. It seems far fetched to charge the employer with the accident in the instant case. An award will therefore be made denying compensation. Each side will pay its own cost.

[Docket No. 142]

BEN DUKE HILL, Employee, Plaintiff, v. SOUTHERN FIRE INSURANCE COMPANY, and FIDELITY AND CASUALTY COMPANY, Carrier, Defendants

Filed December 17, 1929

Hernia.—Where requirements of Section 2 (r) have been met Claimant entitled to operation and compensation.

Hearing before J. Dewey Dorsett, Commissioner, at Durham, N. C., on December 13, 1929.

Mr. Ben Duke Hill, Employee, plaintiff, is present without counsel.

The Southern Fire Insurance Company is represented by *A. Levin.*

The Fidelity and Casualty Company, Carrier, is represented by their Agent, *Mr. L. S. Harris.*

Opinion by Dorsett, Commissioner.

Statement of the Case

Ben Duke Hill, a regular employee of the Southern Fire Insurance Company, was injured about three o'clock on the afternoon of October 8, 1929. The claimant received from the accident a hernia or rupture, or what he thought to be a hernia or rupture. He suffered some slight pain just after lifting some packages that would probably weigh seventy-five or one hundred pounds. The pain began to get worse, causing him to feel it necessary to call for a doctor. He went to see a doctor and was operated on for hernia, the doctor having diagnosed his trouble as a hernia. It was admitted by the defendants that the parties to this proceeding are all bound by the provisions of the North Carolina Workmen's Compensation Law and that the average weekly wage of the plaintiff is $26.75.

Findings of Fact

1. All the parties to this proceeding are bound by the provisions of the Compensation Act. The Fidelity and Casualty Company is the insurance carrier and the parties defendant.

2. While regularly employed by the defendant employer, the plaintiff received an accident, resulting in a hernia. The said hernia arose out of and in the course of employment.

3. The average weekly wage was $26.75.

4. The requirements of Section 2 (r) of the Compensation Act have been met by the plaintiff.

5. The plaintiff has been operated upon for hernia.

6. The plaintiff was totally disabled for a period of three weeks.

Conclusions of Law

When the requirements of Section 2 of the North Carolina Workmen's Compensation Act have been complied with, an award will issue, paying compensation and all medical and hospital bills connected with the accident. The defendant is therefore ordered to pay compensation at the rate of sixty per cent of $26.75 for a period of three weeks less the waiting period of seven days. The defendant will also pay the reasonable cost of hospital and medical bills incurred by the accident and the cost of this hearing.

[Docket No. 92]

R. W. HODGES, Deceased, Employee, and Mrs. R. W. HODGES, et al., Plaintiffs, v. SOUTHERN PUBLIC UTILITIES COMPANY, Employer, Self-Insurer, Defendant

Filed December 18, 1929

SAFETY APPLIANCES.—Where evidence does not sustain allegation wilful refusal to use safety appliances ten per cent reduction compensation disallowed.

Hearing before Commissioner WILSON at Winston-Salem, N. C., December 3, 1929.

Plaintiff appeared in person.

Defendant represented by *I. E. Carlyle*, Attorney, of *Manly, Hendren & Womble*, Winston-Salem, N. C.

Opinion by WILSON, Commissioner.

Statement of the Case

This case was heard to ascertain if R. W. Hodges, deceased, wilfully failed "to use a safety appliance" while performing his work, which resulted in his death by accident on Friday, October 25, 1929; said deceased being regularly employed by the Southern Public Utilities Co. at the time of said accident. Said accident was the result of electrocution while said deceased was at the top of the pole where he had been working as a lineman but had finished the particular job. It was time for his noon lunch and as his fellow employees rode by in a truck, one called to him to come down. When the truck had been parked a couple of hundred feet away, a fellow worker looked up the pole to learn that said deceased had been electrocuted. Testimony of witnesses was to the effect that said deceased had finished his job; that the safety appliances in question, a pair of rubber gloves, were in their regular container. Testimony tended to show that it was customary for linemen to change from rubber to leather gloves at the top of the pole when the wires were sufficiently far apart to be safe. They were ordered to not wear the rubber gloves while climbing or descending poles.

All other facts in this case were admitted. Upon the evidence in this case the Commission makes the following

Findings of Fact

1. That deceased was regularly employed by the Southern Public Utilities Company, self-insurer, at the time of his injury and death, Friday, October 25, 1929.

2. That said R. W. Hodges died as a result of an accidental injury caused by electrocution, said accident arising out of and in the course of his employment.

3. That said deceased did not wilfully fail to use the rubber gloves, and, therefore, his dependents are entitled to full compensation.

4. That said deceased left a widow, Mrs. R. W. Hodges, and five children, Elsie May (10), Ruby L. (8), Emily O. (6), Robert W. Jr. (4), and George C. (2), who were dependent upon his earnings for support.

5. That the average weekly wages of the deceased were $28.85.

6. That all medical bills have been paid; also the burial expenses, $245.82; that the said $45.82 was authorized by the said widow.

Conclusions of Law

Section 13 of the Compensation Law says: "The burden of proof shall be upon him who claims an exemption or forfeiture under this Section." Said section, in part, says: "When the injury or death is caused by the wilful failure of the employee to use a safety appliance or perform a statutory duty or by the wilful breach of any rule or regulation adopted by the employer and approved by the Commission and brought to the knowledge of the employee prior to the injury, compensation shall be reduced ten per cent."

No evidence was submitted tending to prove that said deceased willfully failed to use the rubber gloves. Instead, his work had been finished and his fellow employee considered the top of the pole a reasonably safe place to change gloves.

1. Therefore, the ten per cent reduction claimed by the defendant is disallowed.

2. Under Section 38, the dependents of said deceased are entitled to $6,000.00 less the burial expense of $245.82; which burial expense has been paid by defendants; said compensation to be paid at the rate of $18.00 per week to the widow of deceased and mother of said children as the natural guardian and one of the dependents.

An award will be made in accordance with the above conclusions of law. The defendants are to pay the cost of this hearing.

[Docket No. 96]

S. EARLE COBB, Employee, Plaintiff, v. ODELL HARDWARE COMPANY, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed December 19, 1929

Lung Collapse.—Strain causing collapse of lung held injury by accident arising out of and in course of employment.

The Plaintiff is not represented by counsel.
The Insurance Carrier is represented by their Agent, *Mr. Riddle.*

Opinion by Dorsett, Commissioner.

Statement of the Case

Mr. S. Earle Cobb, a regular employee of the Odell Hardware Company of Greensboro, N. C., has applied to the North Carolina Industrial Commission for compensation for an injury caused by the lifting and otherwise handling, of certain heavy hardware and showcases, while in the service of his employer. He is asking compensation for temporary total disability, and for the reasonable cost of hospital, medical and other treatment necessary for his recovery.

The plaintiff says that on October 4, 1929, he strained and otherwise injured himself in handling heavy hardware and showcases, and that this straining has caused the complete collapse of his right lung, resulting in his present temporary total disability. He says that he was working for a salary in excess of thirty ($30.00) dollars per week, and that due to his injury sustained in the line of duty to his employer, he should be paid eighteen ($18.00) dollars per week while totally disabled, subject, however, to the provisions of the Law, with reference to the total amount of compensation payable to an injured employee, and that his hospital and medical bills should be paid by the defendants. On the other hand, the defendant insurance carrier, denies liability, on the ground that the injury complained of is not the result of an accident.

The record discloses the following facts: The claimant testifies that on October 4, the date of the injury, he sold one Mr. Huffines some galvanized roofing; that he helped the customer load this roofing on his Ford car; that this roofing was in bundles, some of the bundles weighing approximately two hundred pounds; that while loading this roofing he felt that he had strained himself, feeling a pain in his chest; that prior to that time he was in good health; that he did not remember the last time he had called a doctor to see him; that he had never been sick in his life. He loaded the heavy galvanized roofing about mid-day, and the pain in his chest grew worse and worse as the evening wore on; that when he got ready to go to supper he asked his wife to come for him as he did not feel well. He further testifies that he returned to work that night after supper and worked until about ten o'clock, lifting, and otherwise handling, some new showcases that his employer was installing; that in handling these showcases it was necessary at times to raise them over his head, placing him in a position to easily strain himself. He further testifies that there has never been any tuberculosis in his family, and that if the handling of the heavy hardware and showcases did not cause his present condition he does not know what has caused it.

His immediate boss, one Mr. Hartsook, testifies that on October 4, 1929, that this plaintiff, during the dinner hour, sold some galvanized roofing to a customer, and that the plaintiff assisted the customer in loading this roofing; that the material was heavy; that after supper this plaintiff returned to work and assisted in placing some new showcases in the store; that at times it took two or three, and sometimes four men to handle these cases; that it was sometimes necessary to pick the cases up and carry them over your head; that several of the boys worked until ten o'clock the night of October 4; that all of them, of course, were tired; he further testifies that the night of October 4 this plaintiff complained of a pain in one side; that his wife came and carried him home.

Dr. J. T. Taylor testifies that he didn't examine the plaintiff but was phoned to go to the hospital to look after a personal injury case by an agent of the Maryland Casualty Company, and when he arrived there they told him, at the hospital, they knew nothing about the case, and he later found out that one Dr. Thomas had been called on the case. The doctor was asked, however, whether or not it would be possible for a man to injure himself causing the complete collapse of a lung, by doing the heavy lifting this plaintiff complained of. His answer is "Yes," if as stated above, it would aggravate further disability.

Mr. Huffines, the customer who bought the galvanized iron, testifies that he recalls that Mr. Cobb, the plaintiff, complained, just after loading the galvanized roofing on the automobile.

Dr. J. G. Thomas testifies that he was called to see the plaintiff; that he first saw him on the night of October 5; that the plaintiff told him that he came home about nine o'clock that night with a pain in his chest; that he first thought it was a cold, and that his wife doctored him with some home remedies; later, however, he gave his history, and "related to me about lifting some heavy objects at the store of the hardware company, and that when he lifted them he felt a stinging pain in his chest. This lifting was done on October 4, and that afternoon (of the 4th), he felt worse, but kept on working, taking out only time for supper. The doctor testifies that it seemed to him that it was a gradual thing (speaking of the injury) from noontime on, increasing as night came on. The doctor further testifies that he does not think he can say that the lifting was the exciting cause exactly, but it seemed to start at that time. Dr. Thomas is of the opinion that plaintiff is totally disabled and will be totally disabled for sometime. Dr. Thomas stated that it is probable that the lifting caused the trouble, but that other things could do it. On cross examination by the representative of the insurance company, Dr. Thomas was asked this question, "You are not sure that this injury was caused by an accident?" A. "No, I wouldn't say absolutely; that is just the question. It is a divided opinion." The doctor went further, however, and said that one Dr. Cozart had examined the plaintiff and thought the disability came from the lifting.

Mrs. Cobb, the wife of this plaintiff, testifies that her husband came home on Friday afternoon, October 4, complaining of pains in his chest, and she asked him what he had been doing, and he informed her he had been lifting galvanized iron and a pain had come in his chest. She rubbed his chest with Absorbine, Jr., and gave him Aspirin, and he seemed to get comfortable. On attempting to get up the next morning, however, he was not able to make it, and told her when doing the lifting the day before, he felt a stinging sensation in his chest. Mrs. Cobb testifies that her husband, prior to that time, had been in good health.

The Commissioner, before writing this opinion, has consulted medical experts concerning this case. From all the evidence in the case the Commissioner arrives at the following

Findings of Fact

1. The parties plaintiff and defendants are bound by the provisions of the North Carolina Compensation Law of 1929. The Maryland Casualty Company is the insurance carrier, and has intervened as a party defendant.

2. The plaintiff, on October 4, 1929, suffered an injury by an accident arising out of and in the course of his employment, resulting in the complete collapse of his right lung, causing temporary total disability.

3. The average weekly wage of the plaintiff is in excess of thirty ($30.00) dollars per week.

4. All hospital and medical bills to date have been paid by the plaintiff.

Conclusions of Law

The defendant insurance carrier contends that the plaintiff has not sustained an actual injury, and denies liability on that ground. The burden of proof is upon he who claims compensation, and the claimant in the instant case must prove that the requirements of Section 2 (f) of the North Carolina Compensation Act have been met. That Section says that "injury and personal injury shall mean only injury by accident arising out of and in the course of employment, and shall not include a disease in any form except where it results naturally and unavoidably from the accident." Though an accident is usually predicated on occurrence external to the body, yet internal injury that is itself sudden, unusual and unexpected is none the less accidental. An occurrence, to be accidental must be undesigned and sudden—see words and phrases first and second series. It seems that the strain in handling the heavy hardware and showcases could be called accidental, in view of the unusual occurrence. Bassett Judge, writing the Opinion in Taylor's case, for the Supreme Judicial Court of Maine, says, "in a proceeding to recover compensation for death of an employee, prior good health is evidence to be taken into consideration, 142 Atlantic Reports, page 130, Maine.

Taking into consideration the evidence of the plaintiff, that he had always been in good health, and in addition to this, the evidence of all the witnesses concerning the occurrence on October 4, the nature of the work, and what the witnesses say happened, this Commission is of the opinion that the plaintiff has met the burden upon him, and has established a causal connection between the heavy lifting and the injury sustained. We believe there is competent evidence to sustain this position, that the lifting was the material feature producing the collapsing of the plaintiff's right lung.

The Court of Maine has held that a strain or exertion of a laborer while at his work which caused a cerebral hemorrhage (*Patrick v. Ham*, 119 No., 510, 13 A.L.R., 427), was an accident arising out of and in the course of employment. In this case, we believe the plaintiff, by a preponderance of the evidence, has met the burden of proving that he sustained an accidental injury on October 4, and that the accident arose out of and in the course of his employment. His claim is therefore allowed.

Award

The defendants are ordered to pay to the plaintiff compensation at the rate of $18.00 per week for the period of total disability, not to exceed, however, the maximum amount of compensation allowed by Section 41, which specifies that in no case shall the total compensation payable under the North Carolina Compensation Act exceed six thousand dollars.

The defendants are further ordered to pay the reasonable costs of hospital, medical and other treatment incurred and necessary to meet the requirements of Section 25 of the Act, also such further medical and hospital treatment as may be necessary and the cost of this hearing.

[Docket No. 72]

MAX R. KELLY, Employee, Plaintiff, v. SELECT TIRE SERVICE COMPANY, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed December 26, 1929

HERNIA.—Although twice operated upon for hernia prior to accidental injury. If physical examination made at time of employment reveals no hernia. Hernia resulting from accidental injury compensable.

Hearing before Commissioner T. A. WILSON at Charlotte, N. C., November 25, 1929.

Plaintiff represented by *Enos T. Edwards*, Attorney.

Defendants represented by *W. C. Ginter*, Attorney and Adjuster for the Maryland Casualty Company.

Opinion by WILSON, Commissioner.

Summary of Case

The plaintiff, Max R. Kelly, claims that on October 9, 1929, while regularly employed by Select Tire Service Company, he suffered an accidental injury as the result of undue strain. Said strain caused a "rather large left inguinal hernia," and "a smaller right inguinal hernia."

Said employer services the tires of fleet trucks as part of its business, and it was while servicing a tire of a three or a three and a half ton truck, plaintiff claimed he strained himself. Plaintiff claims the strain was caused by throwing an inflated truck tire mounted on the rim and wheel, except hub, into a truck. Plaintiff immediately felt pain.

L. G. Walters, manager Select Tire Company, testified a 38x7 tire mounted on the rim would weigh 100 pounds. This does not include the wheel. Plaintiff testified the tire mounted on wheel would weigh about 150 to 175 pounds, which included the spokes but not the hub.

Plaintiff was operated on twice before for hernia, seven and five years ago. Each operation was for a single hernia. Just after going to work for Select Tire Company, the first of August, plaintiff had the usual physical examination required by said company. He did not have a hernia at this time. Dr. W. E. Wishart testified plaintiff did not have a hernia when he examined plaintiff for employer.

An effort was made to impeach the testimony of the plaintiff because he was discharged before he started pressing his claim, and after he had casually mentioned his injury.

Plaintiff was not offered an operation nor compensation. His average weekly wage is twenty-five ($25.38) dollars and thirty-eight cents.

Upon the evidence in this case the Commission makes the following

Findings of Fact

1. Plaintiff and employer have accepted the provisions of the Compensation Act; Maryland Casualty Company is the carrier.

2. That plaintiff sustained an accidental injury, which arose out of and in the course of his employment October 9, 1929, which resulted in a large inguinal hernia on the left and a smaller inguinal hernia on the right.

3. That said hernias fulfill the five requirements of Section 2 (r) to wit:

(1) That there was an injury resulting in hernia.

(2) That the hernia appeared suddenly.

(3) That it was accompanied by pain.

(4) That the hernia immediately followed an accident.

(5) That the hernia did not exist prior to the accident for which compensation is claimed is shown by the physical examination.

4. That plaintiff has not been tendered an operation nor compensation.

5. That plaintiff is physically able to have an operation.

6. That plaintiff has been totally disabled since October 19, 1929.

7. That plaintiff's average weekly wage is $25.38.

Upon the foregoing findings of fact, the Commission makes the following

Conclusions of Law

That plaintiff is entitled to an operation as provided for in Section 2 (r) and compensation from October 19, 1929, with proper medical attention, until plaintiff is able to return to work.

Plaintiff is awarded an operation for inguinal hernia on both sides, and compensation at the rate of fifteen dollars ($15.24) and twenty-four cents.

[Docket No. 113]

BELTON BLACKWELL, Plaintiff, v. WINSTON-SALEM CHAIR COMPANY, Employer, and OCEAN ACCIDENT AND GUARANTEE CORPORATION, Carrier, Defendants

Filed December 21, 1929

PRE-EXISTING DISEASE.—Where evidence fails to show that accident accelerated or aggravated a pre-existant disease, claim denied.

Hearing before E. W. PRICE, Deputy Commissioner, at Winston-Salem, Forsyth County, N. C., on December 11, 1929.

Plaintiff represented by *Mr. J. T. Fulton*, Attorney, Winston-Salem, N. C.

Defendants represented by *Mr. R. Alton Jackson*, Adjuster for defendant insurance carrier, Winston-Salem, N. C.

Opinion by ALLEN, Chairman.

The evidence taken before the Deputy Commissioner has been duly certified to the Commission in accordance with the provisions of the Act. From such evidence, together with the other papers and documents composing the record in the case, the Commissioner makes the following

Statement of the Case

It was admitted upon the hearing that the plaintiff on September 13, 1929, while in the employ of the defendant, Winston-Salem Chair Company, sustained an injury by accident arising out of and in the course of his employment and that the average weekly wage was $12.70.

The plaintiff while pulling a loaded truck was struck upon the head and back by a falling piece of board. At the time of the accident the plaintiff quit work for three-quarters of an hour, completed the day's work and returned to work the following morning, which was Saturday, but did not work the entire day.

The plaintiff remained away from work until the following Wednesday, on which day he returned to work and continued working until the following Saturday.

There was evidence tending to prove that prior to the occurrence of the accident that the plaintiff had been treated for gastritis, blood pressure, and heart murmur. After the injury he was examined and found to be suffering from muscular heart lesion, or myocarditis.

Upon all the evidence the Commissioner makes the following

Findings of Fact

1. That the plaintiff and defendant are both bound by the operation of the Workmen's Compensation Act, and the Ocean Accident and Guarantee Corporation is defendant insurance carrier.

2. That on September 13, 1929, the plaintiff, while in the employ of the defendant, Winston-Salem Chair Company, sustained an injury by accident that arose out of and in the course of said employment.

3. That the plaintiff's average weekly wage was $12.70.

4. That the plaintiff did not suffer any disability because of said accidental injury.

5. That said accidental injury did not aggravate the pre-existing disease from which the plaintiff was suffering.

Upon the foregoing findings of fact are based the following

Conclusions of Law

The burden of proof is upon the plaintiff to show that there is some causal connection between the accidental injury sustained and the disability which he is sustaining after the occurrence of an injury by accident, unless there is direct positive proof that such accidental injury resulted in the disability.

In this case, at the time of the accident the plaintiff was suffering from a pre-existant disease, blood pressure and myocarditis. He was examined by three medical experts, none of whom testified that this disease was accellerated or aggravated by the accidental injury.

Award

For the reason set out above the plaintiff's claim is denied and an award is ordered dismissing the claim.

Each party to pay its own costs.

[Docket No. 146]

JAMES PEPPERS, Deceased, Employee; GEORGE PEPPERS, Plaintiffs, v. WIGGINS DRUG STORES, INC., Employer, and NEW AMSTERDAM CASUALTY COMPANY, Carrier, Defendants

Filed December 27, 1929

LUNCH HOUR.—Where deceased's employment required continuous duty from 7 a.m. until 6 p.m. and while upon a trip as delivery boy which carried him past his home at lunch hour and he stops to eat and while proceeding thereafter upon his duties happens to accident resulting in death; held to be death caused by injury by accident arising out of and in course of employment.

PERSONAL BUSINESS.—Slight and not unusual deviation from strict course of duty or from ordinary route or that selected by master and work if temporarily abandoned, has been resumed, does not constitute abandonment of employment so as to bar rights to compensation.

Senator *J. M. Broughton* represented the plaintiff.

Mr. Thomas Creekmore represented the defendant insurance carrier.

Opinion by DORSETT, Commissioner.

Statement of the Case

At the hearing of this case on the 13th of December, 1929, the following facts were admitted or proven by uncontradicted testimony.

The deceased, James Peppers, was seventeen years of age, and died on the 16th of November, 1929, from injuries received on Davie Street in the City of Raleigh, while operating a motorcycle which collided with a truck owned by the City of Raleigh. That James Peppers was at that time in the employ of the defendant Wiggins Drug Stores, Inc., and was receiving $14.00 per week wages; that he was employed as a delivery or an errand boy of the Wiggins Drug Stores, Inc., at their drug store located in Hayes-Barton about two miles from the center of the City of Raleigh; and that the employer furnished to the employee a motorcycle which was used by the deceased, exclusively. That the employer owned the said motorcycle and furnished the gas and oil for its operation; and that the deceased at the time he received the injuries from which he died was riding said motorcycle and was returning from his home where he had been for lunch, and was going in the usual direction from his home via one of his employer's drug stores located in the Bland Hotel to the drug store in Hayes-Barton where he was employed. That the accident occurred about 1:30 p.m., on East Davie Street, about five blocks from the Sir Walter Hotel, which is on the corner of East Davie and Fayetteville Streets. That the deceased had been sent by his employer to go on the motorcycle, first, to Bob Upchurch's motorcycle shop, about a block west of the Sir Walter Hotel, and just off of Davie Street; that at the motorcycle shop he was to get a gallon of oil for the motorcycle and then go to the Bland Hotel Store for a package that he was to carry to the Hayes-Barton Store where he was employed.

It was in evidence that the deceased began work for the defendant-employer on Thursday afternoon previous to his death on Saturday, and that he came to lunch on the motorcycle owned by the defendant on Friday about 12:30 p.m., and that prior to his employment by the defendant he had been employed by another drug company as a delivery boy; that it was his habit to come to dinner every day on the motorcycle, and that on the day he was killed he came to dinner a little after 1:00 p.m. It was in evidence that on being asked by his sister why he was late to dinner, he said that his employer had given him an errand to make and had told him that after he had finished the errand he could go by his home and get his dinner; that he went to his home, which was on South Dawson Street just off of Davie Street and stayed just long enough to get his dinner, and that the collision occurred on his way back to his place of business after dinner. That he had in his pocket, and belonging to his employer, a dollar bill, and when he got to the hospital he gave the money to one of his friends stating that the money belonged to the drug store and asked his friend to give it to his mother to give to his employer, which she did.

The evidence offered by the defendant was to the effect that the deceased's hours of employment began at seven in the morning and continued until eleven-thirty in the evening, the closing hour of the drug store, on three days of the week, and the other four days, including Sunday, the hours of the deceased were from seven in the morning to six in the evening, and that there was no special time allowed off for meals. The manager of the Hayes-Barton Drug Store testifies that while he did not employ the deceased, that he knew that the deceased was not to go to dinner but was to eat his dinner at the drug store, said dinner consisting of sandwiches and milk. The representative of the employer who employed the deceased was not offered as a witness, and there was no evidence as to whether at the time of his employment he was expected to use the motorcycle in going home for dinner. The manager of the drug store, however, who testified for the defendant, stated that the boy who succeeded the deceased was permitted by the drug store to use the motorcycle in going home for dinner. The deceased lived at least three miles from the drug store where he was employed.

It was admitted by the defendant-employer, Wiggins Drug Stores, Inc., and by the representatives of the carrier, that the New Amsterdam Casualty Company is the compensation carrier for the defendant-employer. It was also in evidence that the deceased had been working for a number of years, and that his mother received all of his wages for her necessary support.

From all the evidence, the Hearing Commissioner makes the following

Findings of Fact

1. James Peppers, the deceased, was on the 16th day of November, 1929, regularly employed by the Wiggins Drug Stores, Inc., of Raleigh, N. C., at their Hayes-Barton Store. The deceased and the defendant-employer are bound by the provisions of the North Carolina Workmen's Compensation Act of 1929, neither having rejected the said Act. The New Amsterdam Casualty Company is the carrier and is a party defendant to this proceeding.

2. James Peppers, the deceased, was on November 16, 1929, fatally injured in an accident that arose out of and in the course of his employment. At the time of the accident the average weekly wage being earned by the deceased was $14.00 for a seven-day week.

3. The deceased was seventeen years of age, was unmarried, and left no dependents who, under our law, are conclusively presumed to be dependent.

4. George Peppers and wife, Martha Ann Peppers, the parents of James Peppers, the deceased, were at the time of the accident and for more than three months prior thereto partially dependent upon the earnings of the deceased for their support.

5. From the evidence we find that the deceased was a minor, and that he had during the time since he was large enough to earn any money, turned his entire earnings over to his parents. It was found as a fact that the said parents were, and are, dependent to the extent of the entire earnings of their minor deceased son, or $14.00 a week, and are therefore entitled to receive 60 per cent of $14.00, or $8.40 per week, for a period of 350 weeks as provided by Section 38 of the Workmen's Compensation Act.

Conclusions of Law

There are three questions for determination in this case; first, did the accident arise out of and in the course of the employment; second, are there any dependents wholly or partially dependent; third, the amount of money the dependents or personal representative is entitled to receive.

Each case will present different circumstances; in this one, did the deceased suffer an accident resulting from a risk reasonably incidental to his employment, and did the accident occur in the course of his employment? The burden of proof is on the claimant-plaintiffs to show that there was an accident and that it arose out of and in the course of the employment. Can it be said that the deceased employee when fatally injured was doing what a man so employed may reasonably do? We believe that the accident did arise out of and in the course of the employment of the deceased, and this must necessarily be so to enable the claimants to receive compensation for the death of their son.

Compensation for disability or death is conditioned in our Act upon the disability or death being due to an accidental injury which arose out of and in the course of the employment. The two elements of this phrase are discussed in an Illinois case in which the court says: "The words 'arising out of' and the words 'in the course of' are used conjunctively. In order to satisfy the statute, both conditions must concur. It is not sufficient that the accident occur in the course of the employment, but the causative danger must also arise out of it. The words 'arising out of' refer to the origin or cause of the accident, and are descriptive of its character, while the words 'in the course of' refer to the time, place, and circumstances under which the accident takes place." *Fitzgerald v. Clarke & Sons,* 1 B. W. C. C., 197; *Dietzen Co. v. Industrial Board,* 279, Ill., 11, 116 N. E., 684. In speaking on this same subject, the Supreme Court of Massachusetts said: "Injury may be said to arise out of the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the condition under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it 'arises out of' the employment, but it excludes an injury which cannot be fairly traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence." McNichols Case, 215 Mass. 497, 102 N.E., 697, L. R. A., 1916A 306.

In a Kentucky case, the court expressed itself as follows: "Many of the courts of this country, as well as in England, have experienced difficulty in determining when an accident arises 'out of' the employment. The words 'in the course of' employment have reference to the time, place, and circumstances while the words 'arising out of' the employment relate to the cause or source of the accident. The terms 'out of' and 'in the course of' are not synonymous, and if either of these elements is missing, there can be no recovery. The two questions are to be determined by different tests. The words 'out of' refer to the origin or cause of the accident, and the words 'in the course of' to the time, place, and circumstances under which it occurred. So it has been said that an injury which occurs while an employee is doing what he might reasonably do at the time and place is one which arises 'out of and in the course of the employment.' L. R. A. 1916A., 232.

"In *Bryant v. Bissell*, 84 N. J. Law, 72, 86 Atl., 458, it was held that an accident arises 'in the course of the employment' if it occurs while the employee is doing what a man so employed may reasonably do in the time during which he is reasonably employed and at a place where he may reasonably be during that time, and it arises 'out of' the employment when it is something the risk of which may have been contemplated by a reasonable person, when entering the employment, as incidental thereto."

A court in an Iowa case quotes with approval the following from page 73 Corpus Juris (W. C.): In determining whether an accident arose out of and in the course of the employment, each case must be decided with reference to its own attendant circumstances: and it has indeed been stated rather broadly but by eminent authority that argument by analogy is valueless."

The evidence in this case discloses the fact of an employer working a seventeen-year-old negro boy, three days in each week from seven in the morning until eleven-thirty at night, or sixteen and one-half hours, and four days in each week from seven in the morning until six in the evening, or eleven hours each day. In addition to this, the employer says in this record that this negro boy was supposed to stay on the job continually during that time; that he, the deceased, was supposed to get his meals at the store, the meals consisting of sandwiches and milk (or whatever he could get at the store for his meals). The deceased was called upon to make a trip that carried him close to his home at the dinner hour, and while on this trip he went by his home to get something to eat. On returning to his master's place of business by the most direct route, he suffered the accident that resulted in his death. He had been using his employer's motorcycle in going to dinner, and there is no evidence that he was told not to do this. However, there is evidence that his successor, a white boy, uses the motorcycle for that purpose and with the knowledge and consent of his employer, for the purpose of getting the errand boy back to the store as quickly as possible.

The authorities show that under the facts of this case the accident arose out of and in the course of the employment, both as a matter of fact and as a matter of law. If the servant's diviation from the strict course of his employment or duty is slight and not unusual, we believe as a matter of law that he is still executing his master's business. If the deviation is very marked and unusual, we believe he is not executing his master's business within the rule that the master is liable for his negligence.

"In cases of deviation, the authorities are clearly to the effect that a mere departure by the servant from the strict course of his duty even for a purpose of his own, will not in and of itself, be such a departure from the master's business as to relieve him of responsibilty. Not every deviation of the servant from the strict execution of his duty, nor every disregard of particular instruction, will be such an interruption of the course of employment as to determine or suspend the master's responsibility; but where there is not merely deviation, but a total departure, from the course of the master's business, so that the servant may be said to be 'on a frolic of his own,' the master is no longer answerable for the servant's conduct." Pollock, Torts, 76; *Ritchie v. Walker*, 27 L.R.A., 161, 167.

The Supreme Court of North Carolina in the recent case of *Duncan v. Overton*, 182 N. C., 80, in an opinion by Chief Justice Clark, laid down the doctrine that a slight or incidental divergence or deviation in discharging duty, does not relieve the master from responsibility for the acts of the servant. In that case, "the father had directed his son to drive his car from Nashville to Raleigh, to carry himself and his luggage to the A. and E. College, and thereafter to take the car to the garage in Raleigh for repairs. The son testified that he met some other college students at the Union Depot in Raleigh and was conveying them and their suit-cases in the car to the college at the time the injury to the plaintiff occurred."

The trial judge left it to the jury to say whether at the time of the injury the son was engaged in carrying out his father's instruction. The jury found for the plaintiff.

In concluding the opinion at page 82, Judge Clark said, "Indeed, we think the law is stricter against the defendant than as stated in the charge. The father having placed his son in charge of the machine to bring it from Nashville to the A. and E. college at Raleigh, and thence to the garage, is responsible for injuries accruing from the negligence of his agent while in charge of the machine on that errand, and is not released therefrom by an incidental divergence in discharging the duty entrusted to him before the driver reached the garage, such as it testified to in this case."

The case of *Bryan v. Bunis*, decided by the Appellate Division of the Supreme Court of New York, on March 12, 1924, and reported in 208, Appellate Division Reports, at page 389, held that the comparatively slight deviation by the employee from the direct route back to the shop in order that he might obtain his usual noonday meal was not an engagement in a new, independent enterprise, or an abandonment of his master's work. The court further says that mere deviation from the ordinary route or from that selected by the master, even for a purpose conceived by the servant, does not relieve the master from liability if his business, generally speaking, is still being carried on; and if the work, though temporarily abandoned, has been resumed, the same rule applies. A deviation for a casual visit constitutes merely misconduct in the servant's employment and not an abandonment thereof. The deviation by a servant of a few blocks for ends of his own does not relieve the master of liability.

Where there is a long and unnecessary divergence from the course prescribed, the master is relieved from liability and a departure by the servant from the ambit of his duty to engage in a frolic has the same effect.

His employment was not changed, at least as a matter of law, by going to his home on this errand. To go at the usual time for a meal is an incident of employment.

The court further held that even if he temporarily abandoned his master's business when making the call, he resumed it on starting to return to his place of business. If a master would have to respond in damages to a third party for an injury inflicted by a servant, then the servant under the Workmen's Compensation Acts is entitled to compensation. In the instant case, this Commissioner is of the opinion that the burden of proof has been met by the claimants and that the claimants ought to recover, and it is so ordered.

Award

The defendants are ordered to pay to the dependents, George Peppers and Martha Ann Peppers, compensation at the rate of $8.40 a week for a period of 350 weeks. The defendants are further ordered to pay all of the hospital and medical bills incurred, and funeral expenses not to exceed $200.00, and also the costs of this hearing.

[Docket No. 43]

ERNEST CROWDER, Plaintiff, v. CAROLINA MINERAL COMPANY, Employer, and THE GLOBE INDEMNITY COMPANY, Carrier, Defendants

Filed December 28, 1929

FINGER.—Loss of "more than" one phalange very clear and entitles claimant to loss of finger where there is a loss of "more than" one phalange.

P. W. Garland, Attorney at Law, Gastonia, N. C., for the defendant carrier.
Claimant is not represented by counsel.
Review before the full Commission at Raleigh, N. C., December 16, 1929.

DORSETT, Commissioner, rendered the opinion.

This came on for review before the full Commission upon application of the insurance carrier who is aggrieved at the findings of fact and conclusions of law of the Hearing Commissioner, rendered November 25, 1929.

The testimony of Dr. C. A. Peterson is that the claimant has suffered the loss by amputation of the first joint of the index finger on the left hand, and that claimant has lost the first distal phalange. The evidence of the same doctor shows that he amputated the middle finger of the left hand below the first joint, and that the claimant lost the first distal phalange, and one-third of the second distal phalange. The Hearing Commissioner therefore found as a fact that the claimant lost the first distal phalange of the index finger on the left hand, and also lost one and one-third phalanges of the middle finger of the left hand, and that one and one-third phalanges constitutes the loss of more than one phalange.

Section 31 (f) of the North Carolina Compensation Law says, "the loss of the first phalange of the thumb or any finger shall be considered to be equal to one-half of such thumb or finger, and the compensation shall be for one-half of the period of time above specified." Section G says, "the loss of more than one phalange shall be considered the loss of one entire finger or thumb, provided, however, that in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand."

The contention of the insurance carrier is that before there is loss under the statute of a whole finger there should be the loss of more than the phalange and a half, and that anything less than this should be compensated for as the loss of half the finger.

The language of the Act is very clear. "More than" means exactly what it says, and if an injured employee has lost "more than" one phalange, then he is entitled under the Law to receive compensation for the loss of the entire finger.

Where there is no error in the findings of fact or conclusions of law of the Hearing Commissioner, the full Commission, upon review, will adopt such findings of fact and conclusions of law as their own.

The findings of fact and conclusions of law of Chairman Allen are affirmed and adopted by the full Commission.

[Docket No. 104]

GURNEY MEREDITH, Plaintiff, v. HIGH POINT FURNITURE COMPANY, Employer, and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Defendants

Filed December 28, 1929

MEDICAL CARE.—Where evidence does not support contention of refusal of medical treatment compensation will not be denied.

Hearing before E. W. Price, Deputy Commissioner, at High Point, Guilford County, N. C., on December 10, 1929.

Plaintiff represented by *Mr. Z. I. Walser*, Attorney, High Point, N. C.

Defendants represented by *Mr. I. E. Carlyle, Manley, Hendren & Womble*, Winston-Salem, N. C.

Opinion by ALLEN, Chairman.

From the evidence taken before the Deputy Commissioner, which has been duly certified to the Commission in accordance with the Act, together with the other papers and documents composing the record, the Commissioner makes the following

Findings of Fact

1. That the plaintiff on July 25, 1929, sustained an injury by accident that arose out of and in the course of his employment by the High Point Furniture Company, and that the plaintiff's average weekly wage was $20.60.

2. That said employment was subject to the Workmen's Compensation Act, and that the defendant, High Point Furniture Company, insured its

compensation liability with the American Mutual Liability Insurance Company.

3. That as a result of said injury the plaintiff lost the second finger of his left hand and at the time of the hearing had sustained a fifty per cent permanent loss of use to the third finger of the left hand.

4. That the plaintiff has not refused medical, hospital, surgical, or other treatment tendered by his employer.

5. That the temporary total disability sustained by plaintiff terminated four weeks after August 29th, or on September 26, 1929.

Upon the foregoing findings of fact are based the following

Conclusions of Law

There is no conflict in the evidence and no contention is made other than that the present permanent loss of use of the third finger is a result of plaintiff's refusal to accept proper medical treatment. The physician who treated this plaintiff testified that he first treated the injured man on July 25 and amputated the second finger and treated the other portion of the hand, that about August 15th he had the plaintiff report to the hospital and the employee was discharged on August 29th. That before the plaintiff was discharged, "we were trying to limber up those fingers." That, "He refused to have the hand manipulated. He did it himself as much as he could. He did coöperate in that way, in that he would do it as much as he could himself."

The Commission cannot find that the plaintiff refused medical treatment tendered, and for the reasons stated, it is directed that there be issued the following

Award

That the defendants shall pay to the plaintiff compensation at the rate of $12.36 from July 25 to September 26 inclusive for temporary total disability and thereafter pay compensation at the rate of $12.36 per week for a period of forty weeks for specific loss of second finger and fifty per cent loss of use of third finger. Defendants will pay the costs of this hearing.

[Docket No. 19]

HETTIE H. SMITH, Administratrix of JUNIUS HERBERT SMITH, JR., Deceased, Plaintiff, v. CAROLINA POWER & LIGHT COMPANY, Self-Insurer, Defendant

Filed December 30, 1929

REVIEW.—Where evidence does not warrant change in finding of fact and where conclusion of law are sound and correctly stated Hearing Commissioner's findings and conclusions will be adopted by full commission.

DEATH BENEFITS.—Where findings are that deceased left dependents personal representative not entitled to compensation under either Section 29 or 40. This conclusion emphasized upon considering that adminstrator cannot be forced to qualify prior to hearing requested by dependents and if qualified thereafter has the right to be heard if Act otherwise construed.

Review by the Full Commission at Raleigh, N. C., upon request of plaintiff, Mrs. Hettie H. Smith, Administratrix, from the decision rendered by Commissioner Dorsett, filed November 13, 1929.

Plaintiff not present, nor represented; brief submitted on behalf of plaintiff by *Royster & Royster.*

Defendant represented by *W. H. Weatherspoon* and *L. G. Benford.*

Opinion by ALLEN, Chairman, for Full Commission.

This Commission on September 23, 1929, conducted a hearing at Oxford, N. C., hearing had before Commissioners Dorsett and Wilson, and thereupon an opinion was filed by Commissioner Dorsett on September 25, 1929, whereupon an award was issued under date of September 30. This proceeding was had upon request of the defendant in the above styled case to inquire into the amount of compensation due and to whom it is payable in the case of Junius Herbert Smith, Jr., deceased employee of the defendant, who died as a result of injuries sustained by an accident arising out of and in the course of his employment on August 29, 1929, by the defendant. The opinion filed by Dorsett, Commissioner, September 25, 1929, found as a fact that Mrs. Hettie H. Smith was partially dependent upon the deceased at the time of his death, and the award issued thereunder on September 30, 1929, directed the payment of compensation at the rate of $4.78 per week for a period of three hundred and fifty weeks, plus $200.00 funeral expenses, to Mrs. Hettie H. Smith as a partial dependent. The record discloses that at the hearing had on September 23, 1929, all persons probably dependent upon the deceased, and also Mr. Junius Herbert Smith, Sr., and Mrs. Hettie H. Smith were present. At this hearing it was admitted that no administrator had been appointed.

From the opinion filed and the award issued thereon on September 30, 1929, there has been filed no notice of appeal either to the full Commission or to the Superior Court.

Under date of October 28, 1929, a request for hearing was filed by Mrs. Hettie H. Smith, administratrix of Junius Herbert Smith, Jr., deceased, said request being dated October 25, 1929. Upon due notice to all interested parties, a hearing was held on November 5, 1929, at Oxford, N. C., before Commissioner Dorsett, and an opinion was filed thereupon by Commissioner Dorsett on November 13, 1929, upon which an award was issued November 14, 1929, denying compensation to Mrs. Hettie H. Smith, administratrix of Junius Herbert Smith, Jr., deceased, for the death of Junius Herbert Smith, Jr., on August 29, 1929, on the ground that the Commission had found that the deceased left dependents partially dependent upon him at the time of his death, for support, and in such a case the personal representative would not be entitled to compensation. From this latter opinion and award, the plaintiff, Hettie H. Smith, administratrix, duly filed notice of appeal to the full Commission on November 20, 1929.

Upon the call of the case upon review, the defendant only being represented, the counsel for the defendant gave notice that it would not present any argument. The attorneys for the plaintiff administratrix have filed an excellent brief upon the questions raised.

After fully considering the evidence taken in both the hearings above referred to in connection with the opinions filed by Commissioner Dorsett on September 30, 1929, and November 13, 1929, the full Commission cannot find any evidence warranting any change in the findings of facts therein, and except as to the record of proceedings in this case as outlined heretofore herein, makes no change or addition thereto, but the full Commission adopts as its findings of fact the findings set out in the opinions of Commissioner Dorsett under date of September 30, 1929, and November 13, 1929.

Upon the foregoing the full Commission bases the following

Conclusions of Law

Commissioner Dorsett's conclusions in his opinions of September 30, 1929, and November 13, 1929, are sound, and correctly state the proper construction of the Workmen's Compensation Act as apply to the facts as found in each of the opinions, and the said conclusions of law are hereby adopted and affirmed as the findings of fact and conclusions of law of the full Commission with the following additions thereto.

It cannot be held that the opinion and award filed on September 30, 1929, was Res Judicata as to the matters growing out of the hearing on November 5, 1929, for as stated heretofore, no personal representative had been appointed at that time, and Mrs. Hettie H. Smith, administratrix of Junius Herbert Smith, Jr., was not a party to the proceedings of September 24, 1929. See *Price v. Edwards*, 178 N. C., 493.

This Commission does not know under what rule or statute it can require that an administrator qualify in each and every case in this State of a deceased employee whose death is caused by injury as a result of an accident arising out of and in the course of his employment. It is indicated that there will be about two hundred and fifty such deaths each year in the State, and it would require five hundred hearings each year by the Commission to dispose of each such case under the procedure as conducted in this case. A consideration of these facts emphasizes the Commission's construction of the legislative intent as to payments of compensation in fatal cases, such construction being that Section 38 applies where there are dedependents, either wholly or partially dependent, and that Section 40 applies where there are "no dependents" and a personal representative has qualified both clauses being specific. Further, that Section 29 is neither specific as to payments where there "are dependents" nor in cases where there are "no dependents." As heretofore stated, the counsel representing the administratrix had filed an excellent brief, but the full Commission's construction of the Act as relating to payment of compensation for death is contrary to the views expressed in this brief, and therefore the counsel's contention cannot be adopted. It is noted that counsel for the administratrix has in his brief entirely ignored Section 40 of the act which provides for payment to the personal representative of compensation where there are no dependents. However, in this case no consideration of this Section is necessary, since there was found to be dependents partially dependent upon the deceased, and the Hearing Commissioner correctly determined that Section 38 applies in such a case.

For the reasons set forth above, it is ordered that there be issued the following

Award

That the Award of September 30, 1929, ordering "that the defendant Carolina Power & Light Company pay to the plaintiff, Mrs. Hettie H. Smith, as sole partial dependent and mother of Junius Herbert Smith, Jr., deceased, compensation at the rate of $4.78 per week, payable weekly, for a period of three hundred and fifty weeks, beginning from August 29, 1929, and funeral expenses not to exceed $200.00, together with the costs of this hearing," be continued in force until fully paid and discharged, and that the award of November 30, denying compensation to Mrs. Hettie H. Smith as administratrix, be affirmed.

[Docket No. 80]

ROSABELL SMITH, Deceased, Employee, W. H. Smith, et al., Plaintiffs, v. COLLINS & AIKMAN CORPORATION, Employer, and THE TRAVELERS INSURANCE COMPANY, Carrier, Defendants

Filed December 28, 1929

REVIEW.—Where Hearing Commissioner's findings and conclusions are in accordance with evidence they will be adopted by full commission.

DEATH BENEFITS.—Principles expressed in case *Smith v. Carolina Power & Light Company*, Docket 19, cited with approval.

Review by full Commission, at Raleigh, N. C., December 16, 1929, upon request of plaintiff from the decision rendered by Commissioner, filed November 19, 1929.

Plaintiff present in person; *Cooper A. Hall*, Attorney, but not present at hearing.

Hon J. M. Broughton of *Biggs & Broughton* represented the defendants.

Opinion by ALLEN, Chairman, for the Full Commission.

The findings of fact of Commissioner Dorsett are in accordance with the evidence in this case, and his findings as expressed in his opinion of November 19, 1929, are adopted as the findings of fact of the full Commission. Commissioner Dorsett has fully covered the points of law involved in this case, and his conclusions of law are adopted as the conclusions of law of the full Commission.

For the benefit of parties to this proceeding, the pertinent parts of the opinion of Dorsett, Commissioner, in the case of *Smith v. the Carolina Power & Light Company*, Docket No. 19, filed November 13, 1929, and cited in support of the conclusions in the instant case, are quoted below.

"It is a well-recognized principle of law that in the construction of any legislative act the courts endeavor to arrive at the real intent and purpose of the legislature in adopting the act being considered, to give meaning to every section and word of the act insofar as can consistently be done, and in doing this the Act as a whole must be scrutinized with the view of making effective every part thereof where this does not violate the clear intent and purpose of the whole. In the case of *Fortune v. Buncombe County Commissioners*, 140 N. C., 322, we find that the Supreme Court has said: 'A statute should be construed with reference to its general scope and the intent of the legislature in enacting it, and in order to ascertain its purposes the courts must give effect to all its clauses and provisions and must construe ambiguous language in such a sense as will conform to the scope of the Act and affectuate its objects.'

"Aside from the written opinions of the courts of the many states construing similar acts as the North Carolina Workmen's Compensation Act, this act itself volubly expresses the main purpose and intent thereof; the act is entitled 'Workmen's Compensation.' Its many sections repeatedly refer to the benefits to the injured employee and his dependents. The Act defines 'Compensation' as 'the money allowance payable to an employee or *to his dependents* as provided for in this Act and includes funeral benefits provided herein.' (Sec. 2 k).

"This Commission has published in its Bulletin No. 1, page 7, a portion of an opinion written by Justice Pitney of the United States Supreme Court in *New York Central Railroad v. White*, 243 U. S., 188. This opinion sustains the constitutionality of the New York Compensation Act, and Justice Pitney points out the evils which the compensation laws remedied as being the conditions that existed in industry with its relations to its injured employee such as to make the injured employee and *his dependents* a burden upon public or private charity.

"There can be no doubt that the legislature intended that the benefits of the Act were to flow to an injured workman if the injury did not produce death, and if death resulted from the injury the benefits were primarily for the benefit of either dependents or partial dpendents, and should there be neither then the personal representative should collect the benefits.

"We have shown that except for the last sentence in Section 29 and Section 40, there is no provision made for compensation payments as referred to in Section 2 (b) to be made to any persons other than the injured employee and his dependents.

"The last clause of Section 29 is ambiguous and conflicts with Sections 38 and 40; considered alone with the provisions of this section it is meaningless. The section deals with payments to be made to injured employee for total incapacity for work which total incapacity ceases upon the natural death of the injured employee. To construe it as having any connection with any other portion of this Section 29 would be to construe the legislature as having written into the act a life insurance policy upon the life of every injured employee in this State sustaining a temporary or permanent total disability in the amount of $6,000.00. Such a construction would be wholly at variance with the intent and purposes of the whole act, and contrary to public policy.

"It is clearly the primary intent of the Workmen's Compensation Act of this State and other states to provide for compensation to injured employees or their dependents in case of death of employee from injuries resulting proximately from industrial accidents. In case there are *no dependents* the compensation shall be commuted to its present value and paid to the personal representative. Substantiating this construction we find Section 38 provides for payments in case of death proximately caused by accident where there are dependents, and Section 40 provides for payments in case of death caused by accident where there are no dependents. Inasmuch as the last clause of Section 29 is redundant as it appears in connection with any other portion of Section 29, and is specific neither as to the question (a) was death caused proximately from accidental injury, or not; nor the question (b) was the payment to be made if dependency existed or not; we must conclude that the clause is merely one of limitation of death benefits to an amount of $6,000.00 and a general clause as relates to the question: 'In case of death the total sum paid shall be six thousand dollars,' leaving us to look elsewhere to ascertain the legislative intent as to the specific question of the beneficiary and amounts where there are dependents, or are *no dependents*, such cases being specifically provided for in sections 38 and 40. In a recent opinion by Chief Justice Stacy in which he dissents from the court opinion in the case of *Boyd v. Brooks*, 197 N. C., 655, is stated this principle: 'Where an act of the legislature is so vague, indefinite and uncertain that the courts are unable to determine, with any reasonable degree of certainty, what the legislature intended, or is so incomplete or is so conflicting and inconsistent in its provisions that it cannot be executed, it will be declared to be inoperative and void.'

"Our Supreme Court in the case of *School Commission v. Alderman*, 158 N. C. 165, have thus stated the rule of construction in similar cases where there is a conflict between the general clauses and specific clause, as follows:

" 'The ordinary and accepted rule of interpretation is that when a general intent is expressed in a statute, and the act also expresses a particular intent incompatable with the former, the particular intent is to be considered in the nature of an exception.' 1 Lewis Sutherland on Statutory Construction (2d Ed.) 268.

"Considering the foregoing with the rule of our court as set out just above, we must conclude that Section 38 of the act expresses the legislative intent in such a case as is now before us of a compensable injury resulting in death with the deceased having dependents dependent upon him for support at the time of the accident."

It is ordered that an award be issued approving and affirming the award made thereunder by this Commission on November 19, 1929.

[Docket No. 56]

MRS. HALLIE JOHNSON, Plaintiff, v. TAR HEEL MICA COMPANY, Employer, and THE GLOBE INDEMNITY COMPANY,
Carrier, Defendants

Filed December 28, 1929

PHALANGE.—Loss of "more than" one phalange does not require finding that substantial loss of use of entire finger to entitle claimant to compensation for loss entire finger.

Plaintiff represented by *Mr. John C. McBee*, Spruce Pine, N. C., and *Mr. Charles Hutchins*, Burnsville, N. C., at the original Hearing before Matt H. Allen, Chairman, at Plumtree, Avery County, N. C., on November 5, 1929.

Defendants represented by *Mr. Paul B. Clark*, 110 West Main Street, Gastonia, N. C., and *Mr. P. W. Garland*, Attorney, Gastonia, N. C., at the original hearing above mentioned.

Opinion by DORSETT, Commissioner for the full Commission.

This claim came on for review of an award dated November 27, 1929, based upon opinion by Allen, Chairman, rendered November 25, 1929, on application of the insurance carrier.

From the evidence the claimant in this case suffered the loss, on August 31, 1929, of one and one-quarter phalanges of her index finger and one and one-half phalanges of her middle finger of the right hand. Commissioner Allen found as a fact that the claimant lost one and one-quarter phalanges of her index finger and one and one-half phalanges of her middle finger, and that the loss of one and one-half, or one and one-quarter phalanges constitutes the loss of more than one phalange; and under our law, as set out in Section 31 (f) and (g), Commissioner Allen's conclusions of law in this respect are correct. Subsection (f) of Section 31 says that the loss of the first phalange of the thumb or any finger shall be considered to be equal to the loss of one-half of such thumb or finger, and the compensation shall be for one-half of the periods of time above specified. Subsection (g) of Section 31 states that the loss of more than one phalange shall be considered the loss of the entire finger or thumb; Provided, however, that in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand. The contention of the insurance carrier is that before there is loss, under the statute, of a whole finger, there should be the loss of more than a phalange and a half, and that anything less than this should be compensated for as less than one-half a finger. The wording of the statute, we think, is very clear. It states that the loss of more than one phalange shall be compensated for as if the injured lost the entire finger, and it is not encumbent upon the hearing Commissioner to determine whether or not there has been a substantial loss of use of the entire finger before making such an award as the insurance carrier contends should be found.

Where there is no error in the findings of fact, or the conclusions of law of the hearing Commissioner, the full Commission on review will affirm and adopt such findings of fact and conclusions of law as those of the full Commission.

The opinion is eminently fair. The Commission concurs in the findings of fact and conclusions of law of Allen, Chairman, and adopts the same as their own.

[Docket No. 66]

W. R. LOGAN, Deceased, SMILEY WILKINS, Administrator of W. R. LOGAN, Plaintiff, v. ELLIOTT BUILDING COMPANY, Employer, and UNITED STATES CASUALTY COMPANY, Carrier, Defendants

Filed December 30, 1929

Review.—Hearing Commissioner's findings and conclusions affirmed.

Gastric Ulcer.—Is of gradual development and is perforating ulcer of lining membrane of stomach which in this case chronic and no proof that death caused thereby was result of accident. Claim denied.

Hearing before full Commission, at Raleigh, N. C., December 16, 1929, at 10 o'clock a.m.

Plaintiffs represented by *Mr. Oscar J. Mooneyham*, Attorney-at-Law, Henrietta, N. C.

Defendants represented by *Mr. Ralph V. Kidd*, Claim Auditor, United States Casualty Company.

Opinion by Dorsett, Commissioner, for the full Commission.

The claimants are grieved because compensation has been denied them in an opinion by Commissioner Wilson under date of November 25, 1929, and at the request of the claimants the full Commission has reviewed this case, and from all the evidence we do not feel warranted in changing the findings of fact and conclusions of law as found by the hearing Commissioner.

In the opinion of Commissioner Wilson, the evidence established that the conditions which caused the death of W. R. Logan did not result from accidental injury, and he therefore dismissed the case, denying compensation to the claimants. The claimants failed to sustain the burden of proof imposed upon them by the statute, and when this is so, compensation must be denied.

The sole question before us is whether the deceased died from a disease, or whether his death was due to, or contributed to, by the straining or lifting as contended by the plaintiffs, thus aggravating the ulcerated condition of the deceased's stomach.

Gould's Medical Dictionary defines a gastric ulcer as a "perforating ulcer of the lining membrane of the stomach." There is no doubt that the deceased was suffering from a chronic ulcer, if the testimony of the doctor in this case, who, by the way, operated upon the deceased, is to be believed. There was a deep ulcer which evidently ate out a small portion of the stomach, causing a leakage in the peritoneal cavity, which caused his death. The rupture, no doubt, was coincidental with his work but not caused by it. Gastric ulcer is one of the many diseases which are of gradual development. Under the North Carolina Workmen's Compensation Act, a disease is not included in any form, unless and except, where it results naturally and unavoidably from an accident. In this case no one can say when it first appeared. In order to recover, one must be able to prove that an accident occurred, and that that accident was responsible for what followed. This, the record in the present case fails to do. In the evidence presented, it is not at all convincing that the death of the deceased was occasioned by any accidental injury arising out of and in the course of his employment.

The appeal is therefore dismissed, and the findings of fact, and the conclusions of law of the hearing Commissioner are hereby made those of the full Commission.

[Docket No. 136]

PRENTIS MANNING, Plaintiff, v. SOUTHERN DAIRIES, INC., Employer, and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Defendants

Filed December 27, 1929

TERMINATION OF DISABILITY.—Where only positive evidence of termination of disability is undisputed evidence of claimant this is conclusive.

Hearing before E. W. PRICE, Deputy Commissioner, at Winston-Salem, Forsyth County, N. C., December 12, 1929.

Plaintiff represented by *John C. Wallace* and *L. L. Wall.*

Defendants represented by *Mr. C. H. Taylor.*

Opinion by ALLEN, Chairman.

From the evidence taken before the Deputy Commissioner, which has been duly certified to the Commission in accordance with the provisions of the Statute, together with the other papers and documents composing the record in the case, the Commissioner makes the following

Findings of Fact

1. That the plaintiff sustained an injury which arose out of and in the course of his employment on September 26, 1929, by the Southern Dairies, Incorporated, and plaintiff's average weekly wage was Fifteen ($15.00) Dollars.

2. That said employment was subject to the operation of the North Carolina Workmen's Compensation Act and that the defendant Southern Dairies, Incorporated, insured its liability with the American Mutual Liability Insurance Company.

3. That as a result of said accidental injury the plaintiff was totally disabled for a period of thirty days.

Upon the foregoing findings of fact are based the following

Conclusions of Law

The sole question in this case is the termination of temporary total disability. The accident occurred September 26, and the defendants made no report to the Industrial Commission until October 24, when there was mailed a supplementary return-to-work report which was received by the Commission on October 25, and in which it is stated "have not seen the party since day following injury." On November 23, another report was filed by the defendants in which it is stated "did not and will not return to our employ."

It does not appear that any compensation has ever been tendered to the claimant.

There was evidence by the office manager of the defendant Southern Dairies, Incorporated, that plaintiff came to the office of the defendant shortly after the injury and handed him some typewritten letter from an attorney in which there were no demands, and that when the letter was handed to him, he told the plaintiff that he would be protected, and at the same time ordered him to get out of the office. So far as this record discloses the defendant paid no attention to the plaintiff after the examination by the doctor, on October 8, at which time the doctor tesifies that he told claimant that he was able to do light duty. If the plaintiff had fully recovered on October 8, he would have been entitled to compensation for at least six days, and yet there is no suggestion that he was ever tendered one penny, and the defendants made no report of their contentions until October 24. The doctor provided for the plaintiff further testified that he did not see the plaintiff after October 8 until the date of the hearing; that plaintiff, at that time, complained of a swollen and sprained wrist, and that the plaintiff at that time, could only do light work. The testimony of the doctor as to the time the plaintiff should have been able to return to work is merely an opinion. The only positive evidence as to the termination of disability is the undisputed evidence of the plaintiff who testified that he was unable to return to work for thirty days.

Upon the foregoing, it is ordered that an Award issue providing that the defendants pay to the plaintiff compensation at the rate of $9.00 a week for a period of thirty days, from September 26, plus all medical and hospital expenses, together with the costs of this hearing.

[Docket No. 53]

W. C. McQUAY, Plaintiff, v. McCLAREN RUBBER COMPANY, Employer, and U. S. CASUALTY COMPANY, Insurance Carrier, Defendants

Filed January 1, 1930

HERNIA.—Failure to meet five requirements of Section 2 (r), compensation denied.

Hearing before MATT H. ALLEN, Chairman, at Charlotte, Mecklenburg County, N. C., on November 4, 1929, at 10 a.m.

Plaintiff represented by *Mr. Joe W. Erwin*, Law Building, Charlotte, N. C.

Defendants represented by *Mr. Ralph V. Kidd*, Adjuster for the United States Casualty Company, insurance carrier for the McClaren Rubber Company.

Opinion by ALLEN, Chairman.

This was a claim from Mecklenburg County for compensation for hernia. The defendants denied liability upon the grounds that claimant had not sustained any injury in the course of his employment and that the hernia complained of existed prior to the accident.

It was admitted that plaintiff had been in employ of the defendant McClaren Rubber Company prior to date of injury and that at time of the injury his average weekly wages was $17.25, but defendant rubber company denied that claimant was in its employ on the date of the alleged injury.

Plaintiff testified that he went to work for defendant McClaren Rubber Company on July 15 and worked until July 18; that on night of July 15 or 16 while engaged in the work of building tires "he felt something tear loose and come down"; that a pain struck him in his side like "something had busted loose"; that he reported this to his boss, and was put on a light job; that he continued to work on the light job for three nights thereafter; that on or about July 24 he went to a doctor and was thereafter operated upon for hernia; that in 1914 he developed a hernia about the size of his thumb but had never consulted a doctor about it; that the hernia complained of was on same side and right around the same place of the hernia developed in 1914; that between 1914 and the date of injury had never developed larger than his thumb.

Frank Castleberry, a witness for plaintiff, testified that about four weeks before the alleged injury plaintiff exhibited to him in the toilet hernia in left side that looked like a broken egg that was filled up and oblong shape; that after the alleged injury this same hernia appeared to be the size of his two fists.

Dr. W. F. Martin testified that plaintiff came to him on July 24 and gave a history of having had a hernia on the left side for fifteen years and had suffered from pain in his left side, but the pain had become more violent about two or three weeks prior to that time; that upon examination he found a large left inguinal hernia; that he performed operation and found evidence of a large amount of adhesions which indicates an old hernia; that in his opinion hernia was an old one.

Upon the foregoing evidence the Commissioner finds that the hernia complained of was not the result of an accident arising out of and in the course of his employment, which finding makes it unnecessary to pass upon the question of employment.

Sub-section "r" of Section 2 provides, among other things, that hernia or rupture must appear suddenly and must be accompanied by pain and that the hernia or rupture must immediately follow the accident.

The Commission is of the opinion that neither of these three requirements is met by the evidence in this case.

In the case of *Hollifield v. Briggs-Shaffner Company* (Docket No. 13), filed September 23, 1929, the Commission said "Hernia will only be considered accidental under the North Carolina Workmen's Compensation Act where there is real traumatic hernia resulting from the application of force directly to the abdominal wall, either puncturing or tearing the wall. All other cases will be considered as either congenital or of slow development, being a disease rather than an accidental injury, unless conclusive proof is offered that the hernia was immediately caused by sudden effort or strain.

In the case of *Thompson v. Fogle Bros., et al.*, (Docket No. 3), filed October 21, 1929, the Commission said: It seems to be well settled in the medical profession that hernia is a disease that ordinarily develops gradually. The medical profession seems to be also in agreement that very many persons have a predisposition or congenital condition that often develops in hernia independent entirely of any accident. Most such persons frequently find that hernia has developed while the person is incapacitated in his ordinary occupation, and the natural tendency is to try to explain the existence of the hernia by some unusual circumstance such as slipping or lifting or some other circumstance of similar nature. In order to discriminate between that class of hernia, which is in the nature of a disease with slow development, and a real traumatic hernia that is compensable certain rules of evidence have been adopted in various states, sometimes in statutory form and sometimes as rules defined by the courts or Commission to establish a traumatic hernia that is compensable. Among these requirements it is necessary to show some accidental strain or the application of force directly to the abdominal wall sufficient to puncture or tear the same, and that the appearance of hernia accompanying such strain or application of force with serious pain and immediate disability so that medical treatment is necessary and that the employer be notified within a short time of the alleged hernia.

The concensus of medical and surgical opinion runs to the effect that hernia is rarely the result of an accidental injury, that the accident is usually no more than the occasion, instead of the cause, of the malady; that the origin of the difficulty is congenital and more in the nature of disease than an injury.

In the instant case there is no evidence of the application of force directly to the abdominal wall, and no evidence extraordinary exertion, and no evidence of any immediate prostration or physical distress. On the contrary, it appears that plaintiff continued to work for three nights after the alleged injury, and did not consult a doctor until ten days after the injury complained of.

It is inconceivable that a person could continue to work for three days without any expression of severe pain and the desire to consult a physician after an incipient hernia had been forced through the subcutaneous inguinal ring so that complete hernia resulted.

In all claims for compensation for hernia with incident medical and hospital treatment the burden of proof is upon the claimant to establish:

1. That there was an injury resulting in hernia or rupture.
2. That the hernia or rupture appeared suddenly.
3. That it was accompanied by pain.
4. That the hernia or rupture immediately followed an accident.
5. That the hernia or rupture did not exist prior to the accident for which compensation is claimed.

It is ordered that an Award issue denying compensation and medical treatment, and that plaintiff pay the costs.

[Docket No. 105]

J. H. LEWIS, Plaintiff, v. CITY OF HIGH POINT, Employer, and HARTFORD ACCIDENT AND INDEMNITY COMPANY, Defendants

Filed December 28, 1929

MEDICAL SERVICES.—Where injured employee has submitted to and accepted medical treatment to effect cure which gave unsatisfactory results, compensation will not be denied where employee refuses to undergo experimental operation or rebreaking of collar-bone.

TERMINATION OF DISABILITY.—Where no evidence in record of termination of disability or a status of permanent loss of use prior to medical examination on date of hearing, this justifies termination as of that date.

Hearing before Mr. E. W. PRICE, Deputy Commissioner, at High Point, Guilford County, N. C., on December 10, 1929.

Plaintiff represented by *Mr. Z. I. Walser*, High Point, N. C.

Defendants represented by *Mr. A. W. Sapp*, Greensboro, N. C.

Opinion by ALLEN, Chairman.

The testimony taken before the Deputy Commissioner has been duly certified to the Commission in accordance with the provisions of the Act. From the evidence certified, together with the entire record of the case, the Commissioner makes the following

Statement of Case

On August 1, 1929, the plaintiff and defendants entered into an agreement which was approved by an Award of the Commission, dated August 20, 1929; said agreement admits the occurrence of an injury by accident to the plaintiff on July 10, 1929, which arose out of and in the course of the employment of the plaintiff by the defendant City of High Point, and that the plaintiff's average weekly wage was $16.50 at the time of the accidental injury.

The plaintiff testified that he was not able at the time to do his regular work; that he had not been tendered work by the employer suitable to his capacity, and that he had not been able to obtain other work that he could perform because of his disabled condition.

Dr. W. L. Jackson testified that the plaintiff could do a certain type of work, but could not do the full work of a man since the injury; that the union of the clavicle that was broken was not a very beautiful result; that he had offered to reset the bones; that plaintiff was physically fit to submit to an operation to re-break the bone and if done would "*probably*" be restored to a normal use of it again; that it would not, in his opinion, endanger plaintiff's life to re-break the bone and re-set it, but he would administer an anaesthetic to do this. The doctor further testified that plaintiff will never be normal with the results he has. That in his opinion, plaintiff has but seventy-five (75%) per cent normal use of his arm. This estimate was made as of date of the hearing although the doctor had seen the plaintiff continuously since the accident and just a week before the hearing.

From all the evidence, the Commissioner makes the following

Findings of Fact

1. That the employment of the plaintiff by defendant City of High Point, comes within the operation of the North Carolina Workmen's Compensation Act, and that the City of High Point had insured its compensation liability with the Hartford Accident and Indemnity Company.

2. That the plaintiff, on July 10, 1929, sustained an injury by accident, that arose out of and in the course of his employment by the City of High Point, and that plaintiff's average weekly wage was sixteen ($16.50) dollars and fifty cents.

3. That as a result of said accidental injury, the plaintiff was temporarily totally disabled from July 10, 1929, to December 10, 1929.

4. That as a result of said accident, the plaintiff has a permanent loss of use of his left arm to the extent of twenty-five (25%) per cent.

5. That the plaintiff has not refused the necessary medical, hospital, surgical and other treatment tendered him by the employer.

Upon the foregoing findings of fact are based the following

Conclusions of Law

The three questions presented are

(a) The termination of the temporary total disability.

(b) The permanent loss of use of the left arm, if any.

(c) Has the plaintiff refused any medical, hospital, surgical and other treatment provided by the employer.

The undisputed evidence is that the plaintiff was disabled from the date of the accident and had been incapacitated "because of injury to earn the wages which he was receiving at the time of the injury." The defendants discontinued payment of compensation under the Award of August 30 without notice to the employee or to this Commission, or without the approval of the Commission. No request was made by the defendants to have the termination of disability fixed nor have the permanent loss of use of the left arm determined, and this was not determined until this hearing, held at the request of the plaintiff. There is no evidence in the record, therefore, as to the time when this loss of use became permanent and of a fixed status until the hearing, and the only evidence of the percentage of loss of use is by a witness of the defendants. The evidence therefor justifies the findings as to the termination of permanent total disability, and the percentage of permanent loss of use.

The physician who attended the plaintiff testified the plaintiff came to him often to doctor upon him; that he never refused to permit him to examine him; that he just made the proposition to him to break loose the knitting already gone through with and reset the bone, and the plaintiff said he was satisfied.

The Commission cannot find from this evidence that the refusal of the plaintiff to permit the rebreaking of the collar-bone under such circumstances is a refusal to accept any medical, hospital, surgical or other treatment provided by the employer.

The surgeon who recommends the rebreaking of the bone is doubtful of the outcome, and says that it is a hard bone to control, and that there is usually a certain amount of overlapsation in setting breaks of this kind.

Surgeons often differ as to the danger and advisability of operations and if the Commission were to hold that claimants must submit to every major operation when tendered by defendants, cases would arise in which there would be conflict of expert testimony as to the advisability and danger of the operation, and its probable effect upon the claimant, thus leaving the decisions of such questions to the Commission.

If a claimant refuses medical attention in the first instance when tendered, compensation may be withheld or denied, but the Commission will not withhold or deny compensation because of the refusal of a claimant to submit to an experimental operation after he has submitted to an operation and medical treatment provided by the employer with an unsatisfactory result due to faulty, unskillful or negligent surgery, and especially so where the result of such an operation is in doubt.

In this connection the Commission recognizes the fact that in some cases fractures or breaks fail to unite under the most favorable conditions, and that such failure cannot be charged to lack of skill, incompetence or negligence.

Upon the foregoing, the Commissioner orders that an Award issue, providing that the defendants pay to the plaintiff compensation for temporary total disability from July 10, 1929, to and including December 10, 1929, at the rate of nine dollars ($9.90) and ninety cents per week, and thereafter pay compensation for twenty-five per cent permanent loss of use of the left arm at the rate of nine dollars ($9.90) and ninety cents per week, for a period of fifty weeks. Defendants will also pay all medical, surgical and hospital expenses, together with the costs of this hearing.

[Docket No. 87]

W. L. STANSBURY, Employee, Plaintiff, v. W. A. HARMON, Employer, and U. S. FIDELITY AND GUARANTY COMPANY, Carrier, Defendants

Filed December 26, 1929

Vision.—Loss vision one eye entitled claimant to 100 weeks.

Facial Disfigurement.—For scar on forehead extending from lower center upward over right eye compensation allowed in amount of $150.00.

Hearing before Wilson, Commissioner at Boone, N. C., on December 5, 1929.

Plaintiff represented by *Attorney Holshouser* of the law firm of *Trivette & Holshouser.*

Defendants represented by *F. M. Tongue* of the U. S. Fidelity and Guaranty Company.

Opinion by WILSON, Commissioner.

Summary of Case

A hearing was held in the above styled case to ascertain if the plaintiff, W. L. Stansbury, had a serious facial disfigurement as provided for in Section 31 (t) as the result of an accidental injury September 9, 1929, which arose out of and in the course of his employment. Plaintiff was working for W. A. Harmon, defendant, at the time. All other points in this case were previously agreed upon and compensation had been paid up to date, including medical bills, excepting a bill from the Jones Eye, Ear, Nose and Throat Hospital, Johnson City, Tennessee, dated November 18, 1929, for Eight Dollars, which the plaintiff paid personally. Plaintiff shall be reimbursed for the above mentioned bill to the amount of Eight Dollars. The Commissioner found that the agreement entered into for the loss of sight in plaintiff's right eye did not provide for temporary total disability during the healing period, but did provide one hundred weeks' compensation in accordance with Section 31 (q).

Plaintiff was temporary totally disabled from September 9, 1929, to December 5, 1929.

The scar on plaintiff's forehead extended from the lower center diagonally upward over the right eye. A small piece of bone was removed from the outer skull. There is still some sinus trouble as a result of the injury.

Upon the evidence the Commission makes the following

Findings of Fact

1. That plaintiff and defendant employer have accepted the Compensation Act, and that U. S. Fidelity and Guaranty Company is the carrier.
2. That plaintiff sustained a personal injury by accident September 9, 1929, which caused the total loss of vision in plaintiff's right eye, and a serious facial disfigurement of the forehead from a scar as a result of said accident, which arose out of and in the course of employment of said plaintiff.
3. That plaintiff was temporarily totally disabled from September 9, 1929, to December 5, 1929.
4. That plaintiff's average weekly wage is $11.25.
5. That all medical and hospital bills, except $8.00 which was paid personally to Jones Eye, Ear, Nose and Throat Hospital by plaintiff, have been paid by the carrier.

Conclusions of Law

1. Plaintiff is entitled to compensation at the rate of $7.00 per week for the period of temporary total disability from September 9, 1929, to December 5, 1929, and for one hundred weeks, beginning with the ending of the

temporary total disability, as provided for in Section 31 (q) to wit: "For the loss of an eye, sixty per centum of the average weekly wages during one hundred weeks," plus medical attention.

2. Plaintiff is entitled to compensation at the rate of $7.00 per week for twenty-one and three-sevenths weeks for serious facial disfigurement, said compensation to begin at the end of the one hundred weeks to be paid for loss of vision in his right eye, as provided for in Section 31 (t).

Award

Plaintiff is awarded compensation at the rate of $7.00 per week for the period of temporary total disability, and 121 3/7 weeks for total loss of vision in his right eye, and serious facial disfigurement, plus medical attention. Plaintiff to be reimbursed the Eight ($8.00) Dollars paid for medical treatment.

The attorney representing plaintiff will be allowed a fee of $25.00.

[Editor's Note.—The following is continuation of case appearing on page 49 of October opinions.]

[Docket No. 23]

EVA FETHERSON, Employee, Plaintiff, v. THE NEW WAY LAUNDRY, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Judgment and Notice of Appeal

Upon the foregoing evidence of Dr. R. D. Pearson, the Commissioner finds as a fact that the claimant, by reason of the injury sustained, has lost four-fifths of the use of the left hand, and upon such finding, and in pursuance of the provisions of sub-section "T" of Section 31 of the Workmen's Compensation Act, the award heretofore rendered in this cause be and the same is hereby increased from seven ($7.00) Dollars per week for one hundred weeks, to seven ($7.00) dollars per week for one hundred and twenty weeks.

And, it is further appearing from the evidence of Dr. R. D. Pearson that claimant was for three weeks prior to said amputation totally disabled it is ordered and adjudged that an additional award for twenty-one ($21.00) dollars, in a lump sum, be made. It is further ordered that the award heretofore issued be revised and increased in accordance herewith.

Matt H. Allen, Chairman.

W. C. Ginter, representing the defendants, moved the Commission that inasmuch as the compensation received by the claimant prior to her injury was only three ($3.60) dollars sixty cents per week that the award be reduced from seven ($7.00) dollars per week to three ($3.60) dollars sixty cents per week. The Commission being of the opinion that it has no power to render any award below the minimum fixed in the Act of seven ($7.00) dollars per weeks, the motion is overruled and the defendant excepts and gives notice of appeal to the full Commission.

Matt H. Allen, Chairman.

[Docket No. 51]

FRED MILLS, Plaintiff, v. TRANSYLVANIA TANNING COMPANY, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Carrier, Defendants

Filed November 30, 1929

Hearing before MATT H. ALLEN, Chairman, at Brevard, Transylvania County, N. C., at 10:30 a.m., November 9, 1929.

Plaintiff appeared in person.

Defendants represented by *Mr. J. B. Everett*, 1111 Johnston Building, Charlotte, N. C.

Opinion by ALLEN, Chairman.

It was admitted that the plaintiff was in the employ of the defendant company at the time of the injury and that the injury arose out of and in the course of the employment, and that the plaintiff was earning an average daily wage from the Transylvania Tanning Company of $2.55 per day.

The plaintiff, on September 2, 1929, lost his right arm while operating an unhairing machine and was tendered an agreement by the defendant carrier on the basis of $8.02 per week for a period of two hundred weeks. The claimant refused to sign the agreement on the ground that he was earning more than $2.55 per day.

It appears from the evidence that the Transylvania Tanning Company employed three trimmers and paid them on the basis of three cents per hide; that the claimant, Fred Mills, was the third trimmer employed; that the defendant company used two hundred and seventy-five (275) hides per day and that an experienced trimmer could unhair one hundred hides per day; that the trimmers were allowed each day thirty cents extra for cleaning up the pools, making a total of $3.30 per day for the regular trimmers; that the claimant, being the third trimmer employed, was permitted to trim only the hides that were left over and not given to the first two trimmers; thus leaving to the claimant seventy-five hides per day at the rate of three cents per hide, plus thirty cents per day for cleaning the pools.

The plaintiff testified that in addition to the wages received from the Transylvania Tanning Company he did extra work as a stone mason; that he usually left the tannery about three o'clock in the afternoon, and that his average daily wages in addition to the wages received from the Transylvania Tanning Company was between fifty and seventy-five cents; that he had worked at the tannery between five and six years and that the work at the tannery was his principal job.

Mr. D. G. Ward, superintendent of the defendant tannery testified as follows:

"We employ three laborers to trim hides by hand, using large flushing knives for that purpose. Two men, at the time of the injury in question, were the regular men and actually trimmed one hundred hides per day at the rate of three cents per hide, with an extra hour for each, making a total daily earning of $3.30. The injured party, Fred Mills, was the third or last trimmer and was allowed to trim only the hides that were left over and not given to the regular men. On this basis, Fred Mills had only seventy-five hides to trim per day at three cents per hide, with the one hour extra, making a total of $2.55 per day against $3.30 that the regular men were making. We consider his earning capacity equal to either of the two regular men making $3.30 per day, from the fact that the work was not there for him, but he was entirely capable to do the same work as the regular men, and would have done the same work had it been supplied to him."

The plaintiff contends that the method of determining the average weekly wage as prescribed in subsection (e) of Section 2 of the Workmen's Compensation Act will be unfair in his case for the reason that he was only permitted to work part time, and that after his working hours with the Transylvania Tanning Company he was steadily engaged as a stone mason and earned between fifty and seventy-five cents per day, thus bringing the total wage up to approximately the average wage of the other two trimmers who were receiving $3.30 per day.

The plaintiff further contends that sub-section (e) of Section 2 of the Workmen's Compensation Act has the following provisions: "But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury," authorizes the Commission in its discretion to resort to any other rule which would most nearly approximate the amount which the employee would be earning were it not for the injury.

There is some conflict in the testimony of the employer as to the wages received by the claimant. At one time he testified that the claimant was receiving $13.35 per week and at another time in his testimony he stated that the plaintiff's average daily wages amounted to $2.55.

The Commissioner finds as a fact that the plaintiff's average weekly wage from the Transylvania Tanning Company for a period of fifty-two weeks immediately preceeding the injury amounted to $2.55 per day or $15.30 per week, and the Commissioner further finds as a fact that the claimant earned from other sources and particularly from his work as a stone mason an average of sixty cents per day in addition to the $2.55 paid him by the Transylvania Tanning Company.

It appears from the undisputed evidence in this case that the claimant had been in the employ of the defendant company over a period of more than three years, and there is no dispute as to the average weekly wages earned over this period.

Some of the Workmen's Compensation Acts expressly recognize the right of an employee who is working under concurrent contracts with two or more employers to recover from the employer liable on the basis of the entire amount of wages earned, but where this rule is not expressly recognized by the act the loss of wages suffered by an injured employee must be measured by the impairment of his earning capacity in the employment in which he was working at the time of the accident.

Sub-section (e) of Section 2 of the Workmen's Compensation Act fixes the method of arriving at the average weekly wage as follows: Average weekly wages shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceeding the date of the injury, divided by fifty-two."

In the same section we find the following: "But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury."

If the employment of the claimant had been irregular, or if the records as to his wages had been incomplete or in dispute, the Commission, in its discretion would feel justified in resorting to some other method that would, in its opinion, most nearly approximate the amount of his earnings as provided for in Section 2 quoted above.

The Commission recognizes that the rule restricting the wages to the employment at which the injured was working at the time of the accident may, in some cases, work a hardship, but as we read the statute, no other rule can be resorted to when it appears that the claimant has been regularly employed for fifty-two weeks at a wage that is not in dispute.

Under the earlier English Compensation Act there was no provision respecting the award of compensation where the workman was employed concurrently by two different employers, and the Courts in construing that Act held that only compensation based on the earnings from the employer whose employee he was at the time of the injury could be awarded. (*Hathaway v. Argus Printing Company*, 1 Q. B. (Eng.), 96; 70 L.J.Q.B.N.S., 12; 83 L.T.N.S., 465; 49 Week Rep., 113; 64 J.P., 804; W. N., 247; 16 Times L. R., 42; C.A.

In the case of *Simmons v. Heath Laundry Company*, 1 K. B. (Eng.), 543, it was held that a girl employed in the laundry who, in addition to such employment, gave regular piano lessons at home, deriving therefrom a substantial income, was not entitled to recover compensation based on her aggregate earnings at the laundry and as a music teacher.

This same rule seems to have been generally adopted, with some exceptions, by the American Courts.

Thus, in the case of *Re Henry A. Quebect v. General Accident, Fire, and Life Assurance Corporation* (Mass.), 141 N. E., 582; 50 A. L. R., 996, it was held that where a workman is employed for distinct portions of his time daily by two employers having the same superintendent, and is injured while actually working for one of them within the time allotted to him, his average weekly wages on which compensation does depend is based consistently on what is being paid him by the employer in whose services he was when injured.

In Gagnon's Case, 228 Mass., 334, 337, 21 A. L. R., 1528, 117 N. E., 321, 16 N. C. C. A., 286, where the meaning of "average weekly wages" was considered, it was said: "It is plain that this definition confines ascertainment of the wages to the actual employment at the time of the injury, save in the single instance where that is impossible by reason of brief employment in a line of work unusual to the employer. . . . This definition and the decisions rendered respecting it would follow directly the 'basic principle of the Act' as above stated, to the effect that 'the cost of injuries incidental to modern industry' should be regarded as a part of the cost of the production. The average weekly wages is throughout the Act ascertainable only by reference to the wages actually paid at the expense of the industry at which the employee is working. Save in carefully specified exceptions, it is to be ascertained only by reference to the wages paid by the particular employer to the injured employee. It is apparent that the standard for determining the entire cost of the production so far as it includes the cost imposed by the Workmen's Compensation Act, may be found by reference to that particular industry and employer."

The California Supreme Court has taken the opposite view, but by a divided court, four of the judges concurring and three dissenting. *Western Metal Supply Company v. Pillsbury*, 172 Cal., 407.

Upon the foregoing admissions and findings it is ordered that an award issue providing for the payment to the plaintiff by the defendants of compensation at the rate of $9.18 per week, for two hundred weeks, compensation to begin on the 2d day of September, 1929.

Following cases heard and determined, but are valueless as precedents and not published in advance sheets:

Thompson v. Gilbert Engineering Company and Travelers Insurance Company, Docket No. 69.

Johnson v. Drexel Furniture Company and Georgia Casualty Company, Docket No. 89.

Endy v. Southern Dairies Company and American Mutual Liability Insurance Company, Docket No. 102.

Caldwell v. Southeastern Construction Company and Federal Mutual Liability Company, Docket No. 130.

Barrett v. Wannamaker & Wells and Georgia Casualty Co., Docket No. 103.

D. H. Small v. Brice Realty Company and Union Indemnity Co., Docket No. 111.

Allen v. Berry McAlister and Maryland Casualty Company, Docket No. 119.

Vol. I Pages 193 to 252 No. 5

ADVANCE SHEETS

OF

OPINIONS IN CASES

HEARD AND DETERMINED
BY THE

NORTH CAROLINA INDUSTRIAL COMMISSION

RALEIGH

FEBRUARY, 1930

OPINIONS TO FEBRUARY 1

SUBSCRIPTION PRICE $5.00 PER YEAR
IN ADVANCE

PUBLISHED MONTHLY FOR THE COMMISSION
BY
EDWARDS & BROUGHTON COMPANY
RALEIGH, N. C.

Admission applied for as second-class matter January 25, 1930,
at the post-office at Raleigh, North Carolina,
under the Act of March 3, 1879.

INDEX

Case *Page*

Dr. L. A. Crowell, et al. *v.* Cleveland Mill & Power Company et al. 193
Boydkin Byrd *v.* R. S. Garmon & Brother et al. 194
Mrs. Ruby Chambers *v.* Asheville Cotton Mills et al. 196
Price Mabry *v.* Mrs. R. L. Pfohl et al. 198
J. P. Southern, deceased, et al. *v.* Morehead Cotton Mills Company et al. 200
S. W. Cole *v.* Citizens Lumber Company et al. 201
Pauline Burleyson *v.* Cannon Mills Company 203
Gray Wall *v.* Phillips Fertilizer Company et al. 205
J. Frank Holcombe *v.* Biltmore Service Company et al. 207
Jake Williams *v.* Kitchen Lumber Company et al. 209
Eva Jackson *v.* American Enka Corporation et al. 211
Sidney Ramseur *v.* S. E. Ice Utilities Company et al. 212
Mrs. Willow Ballard *v.* Cannon Mills Company 215
Robert Boozer Harden, deceased, et al. *v.* Thomasville Furniture Company et al. 217
Morris L. Porter *v.* Jennings Cotton Mills et al. 218
Frank Chadwick *v.* Menhaden Corporation et al. 220
Ormand E. Chambers *v.* Union Oil Company et al. 221
Miss Nora Keene *v.* Mrs. J. Napier et al. 225
J. H. Lewis *v.* City of High Point et al. 227
Lonnie Mills, deceased, et al. *v.* City of Salisbury et al. 230
J. I. Adams *v.* Buffalo Snowbird Company et al. 232
Otis Wood *v.* Central Carolina Fair Association et al. 235
L. W. Tise *v.* Newman Machine Company et al. 237
Claude Herren *v.* American Enka Corporation et al. 238
R. M. Starnes *v.* Flint Manufacturing Company et al. 239
Gladys Sluder *v.* Asheville Mica Company et al. 240
W. N. Matheson *v.* Hendrick & Wade et al. 242
C. E. Lawing *v.* American Yarn and Processing Company et al. 243
Henry Anner *v.* Johnson Rayon Mills, Inc., et al. 245
D. R. Bynum *v.* J. F. Bridgers 246
John Rice *v.* Denny Roll and Panel Company et al. 247
Lloyd Green *v.* Manville-Jenckes Company et al. 249
Jasper Newton Lawter *v.* Henrietta Mills et al. 250

NORTH CAROLINA INDUSTRIAL COMMISSION

MATT H. ALLEN, CHAIRMAN
J. DEWEY DORSETT
T. A. WILSON
COMMISSIONERS

E. W. PRICE, SECRETARY

ELEVENTH FLOOR RALEIGH BANK & TRUST BUILDING
RALEIGH, N. C.

[Docket No. 95]

DR. L. A. CROWELL, DR. HUBERT SHERRILL, ROMIE (OR ROME) BRACKETT, Employee, Plaintiffs, v. CLEVELAND MILL AND POWER CO., Employer, and AMERICAN MUTUAL LIABILITY INSURANCE CO., Carrier, Defendants

Filed January 3, 1930

HERNIA.—Proof of hernia fulfilling five requirements of Section 2 (r) entitles claimant to operation and necessary medical and hospital bills.

Hearing before WILSON, Commissioner, November 30, 1929, in the Court House at Shelby, N. C.

Plaintiff appeared in person.

Defendants represented by *P. C. Jones*, Adjuster, American Mutual Liability Insurance Co., and *E. A. Gardner*, Attorney.

Opinion by WILSON, Commissioner.

Statement of the Case

From the evidence in this case it appears that the plaintiff, Romie Brackett, strained himself on August 5, 1929, about 8:00 a.m., while pulling a tight tube winder in the plant of the Cleveland Mill and Power Co., said strain causing an inguinal hernia. Several witnesses testified that the plaintiff complained of pain soon after the alleged injury, and plaintiff showed to one or two parties the protrusion in his left side a few days after the injury. Dr. Hubert R. Sherrill testified that he had an occasion to examine plaintiff some thirty days prior to August 5, and at that time he did not observe a hernia.

From the evidence in this case, the Commission makes the following

Findings of Fact

1. That Romie Brackett and Cleveland Mill and Power Company have accepted the Compensation Act, and American Mutual Liability Insurance Company is the carrier.
2. That the plaintiff sustained an accidental injury about 8:00 a.m., August 5, 1929, which resulted in a left inguinal hernia; said accidental injury arose out of and in the course of the regular employment of the plaintiff by the defendant company.
3. That said inguinal hernia fulfills the five requirements set forth in Section 2 (r).
4. That the plaintiff was temporarily totally disabled from August 12, 1929, to September 29, 1929, inclusive.
5. That the plaintiff has had an operation.
6. That the bills for said operation have not been paid.

Conclusions of Law

That the plaintiff is entitled to compensation from August 12 to September 29, 1929, inclusive, at the rate of $7.56 per week, and all doctors', medical, and hospital bills incurred by plaintiff as a result of said hernia shall be paid subject to approval by the Industrial Commission.

It is directed that an award shall be made in accordance with the above, in favor of the plaintiff.

The defendants are to pay the costs.

[Docket No. 42]

BOYDKIN BYRD, Plaintiff, v. R. S. GARMON & BROTHER, Employer, and UNION INDEMNITY COMPANY, Carrier, Defendants.

Filed January 2, 1930

REPORTING ACCIDENT.—Failure to report occurrence of accident alleged to have happened September 13 or 20 until October 12 and further that failure to seek medical aid contradicts claimant and does not support claim and prejudices employer's rights.

EYE.—Muddy sinus over left eye could have been caused by number of things including hot tar, usually attributed to cold.

Hearing before MATT H. ALLEN, Chairman, at Charlotte, Mecklenburg County, N. C., on November 4, 1929.

Plaintiff represented by *Mr. M. K. Harrill,* representing *Mr. Ural R. Murphy,* Attorney, 221 Law Building, Charlotte, N. C.

Defendants represented by *Mr. F. O. Clarkson,* 500 Law Building, Charlotte, N. C.

Opinion by ALLEN, Chairman.

This was a claim from Mecklenburg County for alleged injury to plaintiff's eyes, caused by fumes or vapor from hot pitch.

It was admitted that plaintiff, at the time of the alleged injury, was in the employ of R. S. Garmon & Brother, and that he received two dollars and fifty cents ($2.50) per day while so employed.

The accident report in this case does not carry the date of the accident, and the plaintiff at one point in his testimony says that he was injured on September 20 (record page 12); at another point in his testimony he says that he was injured seven weeks prior to the Friday preceding the hearing, which was held on Monday, November 4 (record page 10), which would fix the date September 13. Attorney for plaintiff reported the accident on October 12 by letter, as follows: "Boydkin Byrd was injured September 24, 1929, and his employer has declined to consider his case. I am enclosing herewith application for hearing on this matter." The application for review fixes the date of the injury as September 20. This report from the attroney was received by the Commission on October 14.

On October 15, employer's report of the accident was received with the statement that the first notice of accident came through claimant's attorney on October 10. In any event notice of this was not given to the employer for a period of from twenty to thirty days.

Dr. E. R. Hipp testified that he examined plaintiff on October 18 and that plaintiff reported to him that he had been injured by tar fumes five weeks before, which would fix the date of the alleged injury on September 13.

Plaintiff testified that he was injured by fumes from a kettle of tar; that he told a co-employee by the name of Jenkins, of the injury, but made no complaint or report to any one else at the time; that he continued to work through Friday and half of the next day; that on Monday he failed to return to work; that on the following Thursday he reported for duty and was told by the superintendent that he was no longer needed because the crowd was not working to suit him; that he did not tell any one at that time of his injury, but did tell an employee, Garner, later; that he was incapacitated for working on account of the injury to his eyes for six weeks; that he did not ask for a doctor or consult a doctor because he did not know that his employer had one engaged.

Mr. G. H. Daughtery testified for the defendant that he was superintendent of the labor; that no report of any accident to plaintiff was ever made to him until he received a letter from plaintiff's attorney several weeks later; that plaintiff reported to him for work on Thursday following the Friday on which the accident is alleged to have occurred, and that he told plaintiff that he did not need him on the job; that plaintiff made no complaint or report of any accident at the time.

T. A. Shaw testified for the defendant that he was timekeeper for defendant, and that no report of the accident was made to him by plaintiff, or any one else until a letter was received from an attorney some weeks later.

Dr. A. M. Whisnant, appointed by the Commission, who examined plaintiff, testified that plaintiff's eyes were normal; that he found the sinus over left eye dark and muddy; that he washed out sinus and got a globule of pus out of it; that the condition he found could have been caused from smoke or vapor from hot tar, or could have been caused from a number of other things; that the condition is usually attributed to cold.

If a claimant seeks compensation for injury resulting from accident which he claims to have arisen out of and in the course of his employment he must show the employer's knowledge of the accident, or that the employer was not prejudiced by delay in giving notice of such accident.

In this case the claimant had opportunity to report the accident immediately thereafter, and again on Saturday while he was engaged in his work, or at the time he received his pay. On the following Thursday he again reported to the employer for duty and made no report of any accident. If a report had been made to the employer immediately after the accident or at any time within the next week, the employer would have had the opportunity to furnish medical treatment and to have determined the extent of the injury. The failure and delay to report the accident has prejudiced the rights of the employer.

Upon the foregoing evidence the Commissioner finds as a fact that the rights of the employer have been prejudiced by the failure and delay in reporting the accident; that the plaintiff did not suffer an injury as a result of an accident arising out of and in the course of his employment; that his average weekly wages, at the time of the alleged injury was fifteen ($15.00) dollars per week; that no total or partial disability resulted from an accident; and that there is no loss of use of the eyes as a result of accident.

Section 22 of the Workmen's Compensation Act provides that every injured employee shall immediately on the occurrence of an accident, or as soon thereafter as is practicable, give, or cause to be given, to the employer a written notice of the accident, and the employee shall not be entitled to physicians fees nor to any compensation which may have accrued prior to the giving of such notice, unless it can be shown that the employer, or his agent, had knowledge of the accident, or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity.

A claimant for compensation has the burden of proof and compensation may be denied where the evidence is not believed or is indefinite and inconsistent.

Plaintiff testified that he was disabled for a period of six weeks after the accident, and yet he admits that he continued to work for the balance of the day after the accident, and on the following day, and that the Thursday following the accident on Friday, he reported to his employer for further duty, and during this period of time made no report of his injury or claim for compensation. The medical expert appointed by the Commission to examine the plaintiff testified that his eyes were normal, and that he found a muddy sinus over the left eye, which condition could have been caused from a number of things, including vapor from hot tar, but that such a condition is usually attributed to cold. There was no evidence offered to corroborate the plaintiff and his failure to report the accident between September 13 or 20 and October 12, and his further failure to seek medical aid tends to contradict him. The evidence as to the date of the accident is indefinite and uncertain, and the Commissioner is of the opinion that the claimant has failed to maintain the burden of proof, and having failed to sustain the burden imposed upon him by the statute of establishing the fact that he sustained an injury arising out of and in the course of his employment, it is ordered that this case be dismissed.

[Docket No. 44]

MRS. RUBY CHAMBERS, Plaintiff, v. ASHEVILLE COTTON MILLS, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed January 3, 1930

FAILURE TO APPEAR.—Claim denied when claimant fails to appear and prosecute claim.

Hearing before MATT H. ALLEN, Chairman, at Asheville, Buncombe County, N. C., November 6, 1929.

The plaintiff did not appear and was not represented by counsel.

The defendants were represented by *Mr. L. B. Carpenter*, Asheville, N. C.

The plaintiff was not present and a messenger was sent to her home. She stated that "she had lost nothing up there and that she would not attend the hearing."

Opinion by ALLEN, Chairman.

Opinion by the Commissioner

This was a report of an accident filed by the employer on October 11, in which it was stated that the injured party claimed that on the afternoon of July 19, as she stooped down to pick up a brush she felt a pain in her right knee, but made no report of any injury until July 25. The attending physician subsequently on October 14 reported that the right knee of plaintiff was symmetrically swollen to one-quarter again the normal size and was tender over and just above the patella; that motion of knee joint elicited pain, but that X-ray showed negative.

No agreement for the payment of compensation was entered into and on October 19 the defendant insurance carrier requested a hearing upon the ground that the condition of claimant was not the result of an accident arising out of and in the course of her employment. The claim was assigned for hearing in the City of Asheville on November 6 and plaintiff duly notified thereof by registered mail. On the day of the hearing plaintiff failed to appear in person and was not represented by counsel. A messenger was sent to her home and returned with the statement that plaintiff declined to appear and prosecute her claim. The Commissioner, of his own motion, examined the attending physician under oath, who testified as follows:

Q. (Mr. L. B. Carpenter): Go ahead and tell Major Allen what you know about this case.

A. (Dr. Geo. A. Mears): This girl is a young woman nearly nineteen years of age. She came to me the twenty-sixth of July and again August 9 and stated that she had on July 19, one week previous, injured her knee. She did not know exactly how she did it. She could not tell me how she hurt her knee. She said that she did not recall any specific injury to it. I have my memorandum on the case. The patient knelt to get a brush from under a machine. She did not recall any specific injury to it and was uncertain concerning the whole thing. The knee joint was swollen a quarter above its normal size. There was no external evidence of any injury. There was no bruised, blue spot. The symptoms, aside from the swelling, were purely subjective. It was tender over and above the patella. Motion of the knee joint elicited pain. With this rather indefinite history as to some recent injury, I got the idea that it might be a tubercular focus. The day following the first visit and on the 27th I had an X-ray taken of the knee, which was negative. She returned home on the 28th day of July. She remained at home following that about two or three days. Then I instituted rest, elevation, and heat and about two or three days after that I happened to look at her teeth. One of them was particularly diseased; I immediately sent her to a dentist and he removed that tooth. Not long after that I noticed a distinct improvement in the knee joint. It was then a case of gradual going down in the size of the knee; there was left only some pain and stiffness from lack of use. It gradually got back to its normal condition, and on September 23, practically two months after the injury, she was able to return to work and has been at work without any complaint since then. As the past history of this girl, she gave me a previous history of an injury to her knee five years ago. One knee, she says, was disabled from seven to ten days. She did not remember which one it was. I did not take a Wassermann test on her; I wanted to, but she would not submit to it. But, on the evidence, my conclusion was that it was an infection, arthritis, from the focus of the tooth.

The burden is upon the employee seeking compensation for injuries to prove facts entitling her to compensation, and this claimant having failed to sustain the burden of proof imposed upon her by the statute of establishing fact that she sustained an injury arising out of and in the course of her employment, it is ordered that the claim be, and the same is hereby dismissed, and that an award issue denying compensation.

[Docket No. 118]

PRICE MABRY, Employee, Plaintiff, v. MRS. R. L. PFOHL, Employer, and
OCEAN ACCIDENT AND GUARANTY CORPORATION,
Carrier, Defendants

Filed January 6, 1930

DISEASE.—Disability resulting from exposure to dew over a considerable period of time is not the result of an accident.

ACCIDENT.—An accident occurs within a restricted period of time, if not suddenly.

Hearing before E. W. PRICE, Deputy Commissioner, at Winston-Salem, Forsyth County, N. C., on December 12, 1929.

Plaintiff represented by *Mr. L. L. Wall*, Attorney, Winston-Salem, N. C.
Defendants represented by *Mr. R. Alton Jackson*, Wachovia Bank Building, Winston-Salem, N. C.

Opinion by ALLEN, Chairman.

Opinion by Commissioner

Upon the evidence taken before the Deputy Commissioner, which has been duly certified to the Commission, as required by the terms of the Act, together with the other papers and documents comprising the record in this case, the Commissioner makes the following

Statement of the Case

The plaintiff contends that during the period about four or five days prior to August 21, while working as a bill-poster for the defendant, Mrs. R. L. Pfohl, he contracted "dew poisoning," which has resulted in his disability from that date to the date of the hearing.

The defendants admit entering into an agreement with the plaintiff on September 7, 1929, which agreement was approved by an award of the Commission on October 15, 1929, for the payment of compensation for temporary total disability. However, they now contend that this agreement was consummated in error, and that upon the discovery of this error they requested the Commission to grant permission to discontinue payments thereunder, after having paid compensation for two weeks, and this request was granted by the Commission pending the hearing.

Upon all the evidence, the Commissioner makes the following

Findings of Fact

1. That the plaintiff and defendant, Mrs. R. L. Pfohl, has accepted the terms of the Workmen's Compensation Act, and that the Ocean Accident and Guaranty Corporation have insured her compensation liability.

2. That on August 21, 1929, and for some time prior thereto, plaintiff was in the employ of the defendant, Mrs. R. L. Pfohl.

3. That the plaintiff's condition since August 21, 1929, is not the result of an accident that arose out of and in the course of his employment.

Upon the foregoing findings of fact are based the following

Conclusions of Law

Section No. 2 (f) of the Act provides that for an injury to be compensable it must result from an accident arising out of and in the course of the employment.

The plaintiff's testimony was to the effect that his condition resulted from continued exposure to dew over a considerable period of time.

While the Commission does not feel that a decision of this case requires a definition of the word "accident," as used in the Workmen's Compensation Act, he is of the opinion that an accident occurs within a restricted period of time, if not suddenly, and that the plaintiff's own testimony, which was not disputed, proves conclusively that his disability did not result from an accident. Disability from disease is not compensable, unless it results naturally and unavoidably from an accident.

While the Commissioner feels the deepest sympathy for the plaintiff, and knows that the claim was presented in good faith, compensation must be denied on the ground that he has not sustained the burden of proof imposed upon him by the statute.

For the reasons stated there will be issued an award denying compensation and dismissing the claim.

[Docket No. 24]

J. P. SOUTHERN, Deceased, Employee, et al., Plaintiffs, v. MOREHEAD COTTON MILLS COMPANY, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed January 4, 1930

REVIEW.—Hearing Commissioner's opinion adopted and affirmed.

NIGHT WATCHMAN.—Compensation allowed where night watchman drowned in effort to conserve master's property.

This was a hearing before the full Commission on appeal by the Defendants, at Raleigh, N. C., November 19, 1929.

Plaintiffs represented by *B. W. Walker*, Attorney.
Defendants represented by *W. C. Ginter* and *Charles W. Bundy.*

Opinion for the full Commission by ALLEN, Chairman.

The sole question presented upon this appeal is whether or not the accident and death arose out of and in the course of the employment of J. P. Southern, deceased.

Statement of the Case

On September 6, 1929, at about 8:10 o'clock p.m., J. P. Southern was drowned in a canal at Spray, N. C. At the time of his death he was employed by the Morehead Cotton Mills Company as a night watchman, and was earning $22.64 per week. The deceased had been in the employ of the defendant company for eighteen years, and had served as night watchman for nine years. On the night of September 6 the deceased was making his regular rounds, admittedly in the performance of his duties, when he observed an automobile on the highway drive into his employer's canal which furnished the water supply used in the regular business of the employer. It appears from the evidence that the deceased, immediatly after this incident, went into the shop and reported to the night foreman, and suggested geting some one to help raise the gates to release the stored waters, stating at the time that they would have to stop the mill and let the water out in order to get the automobile and people out of the canal. It further appears in the evidence that the deceased raised the gates and continued to make his rounds, and did make what is called the "eight o'clock round" after the automobile drove into the canal. The evidence shows that after the deceased reported to the night foreman what had happened and raised the gates and finished his eight o'clock round he was seen to climb down a ladder on the wall of the canal and heard to inquire if any one needed help, and then seen to jump into the water and start swimming across the canal where he was taken by the current and drowned.

The defendants contend that the accident does not come within the provisions of the North Carolina Workmen's Compensation Act in that the accident did not arise out of and in the course of the employment.

Commissioner Dorsett, upon all of the evidence, reached the conclusion that the accident did arise out of and in the course of the employment, and has sustained this position in an able opinion filed with the Commission.

This Commission, after careful consideration of all the evidence and the arguments and briefs of counsel for plaintiff and defendant, hereby agrees to and adopts the findings of fact, award, and opinion made therein, and accepts said findings of fact, award, and opinion as the findings of fact, award and opinion of the full Commission.

[Docket No. 76]

S. W. COLE, Plaintiff, v. CITIZENS LUMBER COMPANY, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed January 4, 1930

DISEASE.—Burden upon claimant to at least establish some connection between an alleged accident and chronic gastric ulcerated condition.

BURDEN OF PROOF.—Upon claimant and where two incidents on two separate days are alleged as accident causing condition and no report made of occurrence for some time thereafter held no accidental injury.

Hearing before MATT H. ALLEN, Chairman, at Asheville, Buncombe County, N. C., on November 14, 1929.

Plaintiff appeared in person.

Defendants represented by *Mr. L. B. Carpenter* and *Mr. J. M. Horner, Jr.*, Attorney, of Asheville, N. C.

Opinion by ALLEN, Chairman.

It was admitted in open court that the plaintiff at the time of the alleged injury was in the employ of the defendant employer and that the average weekly wage was thirty-six dollars.

Plaintiff testified that on or about October 21 he was employed by defendant Citizens Lumber Company and was engaged in putting up doors, and that the weight of a large door accidentally fell upon him, causing a hurting through his stomach and into his back, so that it was necessary to put another man on the particular job; that he then went down to the toilet and rested awhile and then engaged in lighter work; that he felt a little dizzy, but paid no attention to it and worked on until night; that during the night he was dizzy; that he reported to work the next day and while pushing a truck up an incline one of the blocks dropped off of the truck and got under the wheel, stopping the truck and causing a piece of timber to strike him in the stomach; that he did not make any report to his foreman because he did not think he was injured; that about ten o'clock in the morning of the same day he passed a bloody stool and again in the afternoon of the same day between three and four o'clock; that he returned to work on the next day and remained for one hour and then went to his home and called for a doctor; that he mentioned to Mr. Winters the fact that he was hurt with the door but did not see him the next morning when the timber from the truck struck him. On cross examination he testified that both the lifting of the door and the blow from the timber on the following day contributed to his injury; that he was operated upon for gastric ulcer ten years before the accident; that he had also been operated upon for hemorrhoids; that in August or September previous to the alleged injury he was in a run down condition; he suffered from a tired feeling and was afraid of tuberculosis and consulted a physician; that the physician had treated him at intervals between August or September and the date of the alleged injury; that in reporting the accident to his employer he did not mention the blow from the timber on the truck, because he had no idea that he was internally injured; that he did report both the truck incident and the door injury to the doctor.

Dr. W. T. Freeman testified that he had seen plaintiff a few times previous to his present illness; that for several weeks previous to this he was complaining of weakness and general bad feeling; that in the course of his examination he found a tenderness that he thought to be neuritis and sugar in the urine; that he prescribed a general treatment to build up strength; that upon the occasion of his visit to the plaintiff in his present illness, plaintiff stated that he had received a lick in his stomach while at work and had suffered from dizziness and experienced funny bowel movements and vomited some stuff that looked pretty peculiar; that he soon found a hemorrhage from his stomach and immediately gave him a blood transfusion and put him upon a special diet; that there was ample evidence of gastric ulcer; that, in his opinion, the gastric ulcer existed previous to his present illness, and that the gastric ulcer was to some extent the cause of plaintiff's general debility prior to the alleged injury; that there was no sign of any blow on the outside of the abdomen.

Clifford Byerly testified that he was with the plaintiff at the time he claims to have been injured; that plaintiff made no report of it to him and said nothing about it; that he helped plaintiff in his work and was with him all of the time; and that if plaintiff was hurt, he never said anything about it.

Upon the foregoing evidence the Commissioner finds that plaintiff, S. W. Cole, did not sustain an injury by accident on or about October 21, 1929, while employed by the defendant Citizens Lumber Company which arose out of and in the course of his employment.

The burden of proof is upon the claimant to establish at least a preponderance of the evidence that (1) there was an accident and (2) that the injury complained of is the result of the accident, or that the accident accellerated a preëxisting disease or infirmity.

Upon the first question the Commissioner justifies the finding that there was no accident upon the fact that plaintiff testified there were two incidents on two separate days. In the first instance he claims that the weight of a door was forced upon him causing a hurting in his stomach; that in the second instance and on the following day he claims that he received a blow on the abdomen from a piece of timber. He made no report to his employer and continued about his work.

It is true that he complained to his co-employees about a weakness and dizziness, but this condition was not due to any accident, according to his own testimony, because he had been under a doctor's care for the same condition for a period of several weeks prior to October 21. The witness Byerly, who was working with the plaintiff at the time of the alleged injury says that he never heard anything about any accident, but had heard plaintiff complain of not feeling well.

Sub-section (f) of Section 2 of the Compensation Act provides that "injury" shall not include a disease in any form, except where it results naturally and unavoidably from an accident.

It is evident that this plaintiff had been suffering from a gastric ulcer for some time previous to October 21, the date of the alleged injury. A gastric ulcer is a disease which develops gradually. Gould's Medical Dictionary defines a gastric ulcer as "A perforating ulcer of the lining membrane of the stomach."

No one can say when this ulcer first developed. It is admitted that the plaintiff was operated upon ten years before for gastric ulcer. A logical inference from the evidence of the plaintiff and the attending physician is that the plaintiff, at the time of the alleged injury on October 21, was suffering from a chronic ulcerated condition of the stomach, which probably had extended over a period of years.

The burden is upon the plaintiff to establish some connection, at least, between the alleged accident and his present condition, and having failed to sustain the burden imposed upon him by the statute it is ordered that an award issue denying compensation and dismissing this claim.

[Docket No. 133]

PAULINE BURLEYSON, Plaintiff, v. CANNON MILLS COMPANY, Employer, Self-Insured, Defendant

Filed January 4, 1930

DISEASE.—Bell's Palsy or facial paralysis usually caused by exposure to dampness and cold air at night, not permanent and does not incapacitate one from work, although embarrassing and where evidence does not suggest that exposure on any particular occasion to dampness from humidifiers no proof of accident causing this condition.

Hearing before E. W. PRICE, Deputy Commissioner, at Concord, Cabarrus County, N. C., at 3:30 p.m., December 9, 1929.

Plaintiff represented by *Mr. I. W. Burleyson* and *Mr. M. B. Sherrin*.
Defendant represented by *Mr. W. H. Beckerdite*.

Opinion by ALLEN, Chairman.

It was admitted in open court that plaintiff was in the employ of defendant from April 6, 1929, to October 7, 1929, and that the average weekly wage was $10.89.

Opinion by Commissioner

The evidence taken before the Deputy Commissioner has been duly certified to the Commission, in accordance with the provisions of the statute, together with the other papers and documents composing the record in this case, the Commissioner makes the following

Findings of Fact

1. That plaintiff and defendant have adopted the provisions of the Compensation Act, and that the defendant is a self-insurer.

2. That the plaintiff was in the employ of the defendant from April 6, 1929, to October 7, 1929, and that her average weekly wage was $10.89.

3. That the plaintiff has not sustained an injury by accident that arose out of and in the course of said employment.

Upon the findings made are based the following

Conclusions of Law

The evidence tends to show that the plaintiff is suffering from Bell's Palsy, or facial paralysis, which is usually caused by riding in the cold at night, or dampness, or draft, or an unusual atmosphere, or from internal ear trouble. It is not painful or permanent, and does not incapacitate one from work, but it is embarrassing to the person afflicted.

The only evidence offered by the plaintiff to connect the condition of the claimant with her employment is the evidence of some exposure upon the few occasions to dampness from humidifiers in use by the defendants near the place where the claimant was required to work. There is no suggestion that the exposure upon any particular occasion brought on this condition, and, therefore, the Commission can not find that there was an accident. On the other hand, if the Commission could find that there was a continuous exposure to dampness from the humidifiers, and that such exposure to dampness over a period of time would produce such a condition, then the injury, or disease, would be occupational and not compensable under the Act.

Award

The burden of proof is upon the plaintiff to establish an accident with the resulting injury, and having failed it is ordered that the claim be denied, and that an award issued dismissing this case.

Each party to pay her, or its, own costs.

[Docket No. 129]

GRAY WALL, Employee, Plaintiff, v. PHILLIPS FERTILIZER COMPANY, INC., Employer, and FIDELITY AND CASUALTY COMPANY, NEW YORK, Carrier, Defendants

Filed January 29, 1930

HERNIA.—Act silent about potential hernia. Where protrusion immediately follows an accident and otherwise meets requirements of Section 2 (r) operation allowed and compensation awarded.

Hearing before MATT H. ALLEN, Chairman, at Washington, N. C., January 7, 1930.

Plaintiff appeared in person.
Defendants represented by *Mr. Leon Harris.*

Opinion by ALLEN, Chairman.

Statement of the Case

This was a claim from Beaufort County, filed by the claimant for compensation for hernia. The defendants deny liability upon the grounds that the hernia or rupture complained of did not result from injury by accident arising out of and in the course of employment.

It was admitted that the plaintiff was in the employ of the defendant, Phillips Fertilizer Company, Inc., at the time of the alleged injury, and that his average weekly wages at the time amounted to twenty-five dollars ($25.00) per week.

The plaintiff testified that on July 19, 1929, while engaged in lifting a piece of heavy timber he sustained a rupture from strain; that he felt something give way, but thought it was in the hip joint; that he told some of his co-laborers that he had hurt his hip; that he suffered pain in the hip or groin; that he continued to work through the day, and continued to work for several days thereafter; that he made no report to his employer of the accident until more than a week elapsed; that the morning after the strain and injury he exhibited the hernia to one J. F. Warner, a co-laborer; that he consulted Dr. Dave Tayloe about one week after the injury; that he never had any hernia before. Dr. Tayloe testified that he had examined the plaintiff on September 27, and found that he had a direct inguinal hernia, with a large dilation of the left inguinal ring; that the hernia was about the size of a walnut, and was weak and stretched.

Section No. 2 (r) of the Workmen's Compensation Act places the burden of proof upon the claimant to establish to the satisfaction of the Industrial Commission, in all claims for hernia compensation, five requisites, before compensation can be awarded, and accordingly the Commission finds as a fact, from the evidence of this case, that, there was an injury resulting in hernia or rupture; that the hernia or rupture appeared suddenly; that the hernia or rupture was accompanied by pain; that the hernia or rupture immediately followed an accident; and that the hernia or rupture did not exist prior to the accident.

The facts in this case are very similar to the facts in the case of *Yancey v. Boyland Pierce Company et al.*, filed September 23, 1929, and reported in the October issue of the Advance Sheets of Opinions of the North Carolina Industrial Commission.

Hernia is practically always due, first, to the presence of a preformed sac or open pouch of peritoneum which, in the inguinal variety, follows the testis in its descent into the scrotum, which pouch has failed to close in the normal way; and second, to the presence of structural weakness in the neighborhood of the hernial orifices due to poorly developed muscles or fascia. Given these all-important anatomical causes which are in themselves sufficient in many cases to constitute a potential hernia, the actual hernia may develop by reason of a great variety of exciting causes.

The word "accident" has been so frequently interpreted that it has been unnecessary to review the decisions. Briefly, however, it should be pointed out that in order to constitute a compensable injury under our Statutes, it is not necessary that it be caused by unforseen and unexpected application of external force. It may include a strain in which the employee has voluntarily subjected his body in the course of his employment, and which has proved to be greater than his body could bear. It is unnecessary that the strain to which the employee's body is so subjected be an unusual strain. It is the unusual and unexpected injury resulting from a particular strain that constitutes the accident.

(See *Smith v. Pittsburgh Coal Company*, 71 Superior, 325; *Tracy v. Philadelphia and Reading Coal and Iron Company*, 270 Pa., 75; *Watkins v. Pittsburgh Coal Company*, 278 Pa., 463; *Samoskie v. Philadelphia and Reading Coal and Iron Co.*, 280 Pa., 203.)

It was contended in this case that the hernia was due to the presence of a preëxisting congenital sac, which had remained without contents until the gradual and repeated strains incident to daily routine or occupation, caused a gradual dilation until the protrusion appeared. While it may be true that the preformed sac was present, if it had been up to the time of the accident without contents, it would not constitute a true hernia. There must be something in the sac to make it an actual hernia, and if the sac was present, but was latent and empty up to the time of the strain, which increased the intra-abdominal pressure to such an extent as to force a portion of omentum or bowel into the sac, an actual hernia was thereby produced.

In *Yancey v. Boylan-Pearce Company*, WILSON, Commissioner, quoting Gould's Medical Dictionary, defines "hernia" as: "a protrusion of a viscuous through an abnormal opening in the wall of the containing cavity."

The North Carolina Compensation Act is silent upon potential hernia, and whatever may have been the preëxisting condition of the abdominal wall, if the protrusion immediately follows an accident, and there was no preexisting hernia or rupture, an actual hernia will be held to result from the accident or strain.

Award

It is thereupon ordered and adjudged that an award issue, providing that the defendants tender to plaintiff an operation within thirty (30) days from date, and upon failure to do so the plaintiff is authorized to procure such operation, the cost of which shall be borne by the defendants; and that the defendants pay the plaintiff sixty per cent (60%) of his average weekly wages for time lost from employment on account of said operation, as provided in Section No. 29 of the Act.

[Docket No. 61]

J. FRANK HOLCOMBE, Plaintiff, v. BILTMORE SERVICE COMPANY, Employer, and U. S. FIDELITY AND GUARANTY CO., Defendants

Filed January 4, 1929

ARISING OUT OF AND IN COURSE OF.—Employee injured by using streets in vehicles of travel on his employees business entitled, as general rule to compensation without proof of especial exposure to risk.

STREET RISKS.—Employee injured travelling in own automobile from home to employer's place of business to report for day's work, although carrying employer's money, not entitled to compensation.

This was a claim from Buncombe County, heard on November 14, 1929.

Plaintiff appeared in person.

Defendants represented by *Mr. F. M. Tongue*, Adjuster for defendant insurance carrier, Asheville, N. C.

Opinion by ALLEN, Chairman.

It appears from the evidence that the plaintiff was, on August 18, 1929, employed by the defendant, Biltmore Service Company, at a salary of $30.00 per week, as a service station salesman and general assistant to the secretary and treasurer; that he worked twelve hours per day; that when he closed the station at night, if the secretary-treasurer was not on duty, plaintiff was required to take the money from the cash register and place it in a bag and carry it to his home for safekeeping, and return it the following morning; that when the secretary-treasurer was on duty the money was taken home in the same manner by him; that plaintiff owned the automobile in which the injury occurred; that said automobile was maintained by the defendant, and used for emergency service; that on Sunday morning, August 13, 1929, while plaintiff was proceeding from his home to his place of business in his own automobile he was seriously injured in a wreck due to the loss of control of his automobile occasioned by a chicken in the street or road; that he was incapacitated for a period of seventy-eight (78) days; that he has paid out for medical and hospital bills $483.25; that at the time of the injury plaintiff had in his possession the cash sales for the preceding day and was returning to his work with the money in pursuance of an established custom.

G. W. Cushion testified that he was secretary-treasurer of defendant service company; that plaintiff was his assistant; that plaintiff's hours were irregular, dependent upon business and conditions; that he considered plaintiff in his employ after working hours if occasion arose requiring his presence.

Upon the foregong evidence the plaintiff contends that at the time of the accident he was about his master's business and in the course of his employment, although off the premises of the master, in that he was proceeding from his home to his employer's place of business with the cash proceeds from the previous day's sales, and that the Commission should, therefore, find that the accident arose out of and in the course of his employment.

The defendants, on the other hand, contend that plaintiff was off the premises of the master at the time of the accident, and was merely going to his work in the usual and customary manner; that the fact that he had in the automobile the cash proceeds from the previous day's sales does not in any manner connect the injury with the employment; that the plaintiff was not placed upon the street or highway by force of any duty owing to his employer, and that, therefore, the risk of travel was his own.

Conclusions of Law

Upon consideration of all of the evidence, the argument and briefs, the Commissioner finds as a fact that this accident did not arise out of, and in the course of, plaintiff's employment, but resulted from a risk common to all, and which arose out of no special exposure to the dangers of travel and traffic on street or road.

As a general rule an injury suffered by an employee while going to, or returning from work, does not arise out of the employment, but an employee injured by using the streets in vehicles of travel on his employers business is entitled to compensation without proof that he was especially exposed to the risk. On the occasion of this injury the plaintiff was traveling by automobile from his home to the employer's place of business to report for a day's work. Admittedly his principal business was that of salesman and assistant to the secretary-treasurer, so that it clearly appears that the principal factor in the automobile trip from his home to the place of business was to report for duty as salesman and assistant secretary, and that the carrying of the money from his home to the filling station was merely incidental.

The plaintiff lays stress upon the fact that the employer's money was in the automobile, and that the automobile was maintained by the defendant. The Commissioner fails to see the force of the contention that these two facts alone would entitle the claimant to compensation.

In the case of *Shegart v. Industrial Commission, et al.*, the Illinois Supreme Court, on December 19, 1929, held that "Employment does not begin until the employee reaches the place where he is at work, and does not continue after he has left, and where an employee on the first day of his employment is injured while riding in a truck on his way to the place of his employment, and before he has entered upon any of his duties, the injury does not occur in the course of employment, notwithstanding the fact that the truck in which he was riding belonged to his employers."

In the case of *Cronin v. American Oil Company*, the Supreme Court of Pennsylvania, decided on November 25, 1929, that a person employed by a service station who had left the station for his home, carrying funds of the company, was assaulted by three robbers and sustained injuries which resulted in his death, was not entitled to compensation. In this case the Court said: "There is nothing to show that the deceased was attacked by the robbers because of the knowledge that he carried the company's funds. The robbery has no relation to the employment of the deceased, and he was not, at the time, in the course of his regular services."

In the present case if it had appeared that the trip by automobile from the plaintiff's home to the employer's place of business would not have been made, except for the carrying of money to the filling station, there would have been little question as to the liability of the defendant. We do not say that the service of the employer must be the sole cause of the journey, but where the services of the employer is merely an incident to the travel, the employer will not be held liable. There are many cases in which the perils of travel on the highway are so related to the employee as to lay the basis for an award. Street risks are so varied as to defy enumeration or prediction. The result at times has been that the most singular accidents have been held to be incidental to services in the line of duty.

Unquestionably injury through collision is a risk of travel on highways. What concerns us here is whether the risks of travel are also the risks of the employment. In that view, the test of liability in this case seems to be whether or not the *carrying of the money* sent the plaintiff forth upon his journey, bringing exposure to its perils, or whether the principal factor of this mission was due to the duties of work in the services of the defendant corporation. Applying this test, we hold that the plaintiff was not placed upon the street or highway by force of any duty owing to his employer, and that the risk of travel was his own.

Award

It is ordered that this claim be dismissed, and that an award issue denying compensation.

[Docket No. 52]

JAKE WILLIAMS, Plaintiff, v. KITCHEN LUMBER COMPANY, and U. S. FIDELITY AND GUARANTY COMPANY, Defendants

Filed January 4, 1929

INDEPENDENT CONTRACTOR.—Person paid for piecework cutting ties employing others on hourly basis to assist, owner exercising no supervision over work or instructions as to details of performance held independent contractor, not an employee.

Hearing before MATT H. ALLEN, Chairman, at Robbinsville, Graham County, N. C., on November 12, 1929.

Plaintiff represented by *Mr. T. M. Jenkins*, Attorney, Robbinsville, N. C.
Defendant represented by *Mr. R. L. Phillips*, Robbinsville, N. C.

Opinion by ALLEN, Chairman.

This was a claim from Graham County, filed by the plaintiff for compensation for injuries to his left foot.

The defendant denied liability upon the ground that the plaintiff was an independent contractor.

Statement and Findings

The claimant was engaged in hewing cross ties with an axe when his left foot was lacerated and bruised.

Plaintiff testified that he was injured on the 29th day of August, and that he was incapacitated for a period of about eight weeks; that he was employed by the Kitchen Lumber Company, and that his average wages or earnings, including the profits upon the labor of the men employed, amounted to about six dollars ($6.00) per day; that he was paid by the Kitchen Lumber Company twenty-five cents (25c) per tie; that he employed five men whom he paid thirty-five cents (35c) per hour, or three dollars and fifty cents ($3.50) per day; that the Kitchen Lumber Company had nothing to do with the employment of these men, or wages paid the men; that he paid his own expenses and had no drawing account; that he furnished his own tools, and made no daily report to the defendant company; that after the injury of the claimant the work proceeded under the supervision of a son of the claimant; that the instructions received from the Kitchen Lumber Company consisted of the kind and number of ties needed, and the point along the road bed at which the ties were to be delivered; that the Kitchen Lumber Company reserved the right to stop the cutting of ties at any time.

J. B. Buchannon testified that he was superintendent of the defendant company, and that the plaintiff was engaged by the defendant to cut and hew cross ties at twenty-five cents (25c) per tie; that the Kitchen Lumber Company exercised no supervision over the plaintiff's employment; that the plaintiff employed as many or as few men as desired; that the cross ties were counted at intervals of about every two weeks; that the plaintiff was paid at the rate of twenty-five cents (25c) per tie; that the plaintiff hired, paid, and discharged his own men; that the Kitchen Lumber Company had no record of the number of men employed by the plaintiff, or the wages paid; that the plaintiff had been working for the defendant over a period of five years; that he had never worked for the defendant company by the day or year; that the company would report to the plaintiff each week or month the number of ties needed; that no instructions of any kind were ever given to the plaintiff; that the contract with the plaintiff was to cut and hew the ties necessary for the particular job; that the company had the right to stop the cutting and hewing of ties after a sufficient quantity had been cut and delivered to complete the operation.

The Commissioner is unable to find in this testimony any evidence of the relation of employer and employee under the Compensation Act. The burden of proof is upon the plaintiff to establish his claim by a preponderance of evidence, and having failed to do so, the Commissioner finds as a fact from the evidence that the plaintiff was an independent contractor and not subject to the provisions of the Compensation Act.

Conclusions of Law

The doctrine of independent contract has not been abrogated by the Workmen's Compensation Act.

One who contracts to do a specific work, hires and controls his assistants, and executes the work entirely in accordance with his own ideas, or with a plan previously given him by the person for whom the work is done, without being subject to the latter's orders in respect to the details of the work, is not a servant or employee, but is an independent contractor, and not subject to the Workmen's Compensation Act. *Storm v. Thompson,* 185 Iowa 309 (20th A.L.R. 685); *Crafts v. Timber Company,* 132 N. C. 158; *Miggett v. Mfg. Company,* 150 N. C. 340.

Award

It is ordered that this claim be dismissed, and that an award issue denying compensation.

[Docket No. 94]

EVA JACKSON, Plaintiff, v. AMERICAN ENKA CORPORATION, Employer, and TRAVELERS INSURANCE COMPANY, Carrier, Defendants

Filed January 11, 1930

DISEASE.—Mitral regurgitation of heart found not to be result of an accident arising out of and in course of employment.

Hearing before T. A. WILSON, Commissioner, at Asheville, N. C., November 29, 1929.

Plaintiff represented by *Mr. Marcus Erwin,* Asheville, N. C.
Defendant represented by *Mr. A. C. Newsome,* Adjuster for the Travelers Insurance Company, Charlotte, N. C.

Opinion by WILSON, Commissioner.

Summary of the Case

Plaintiff, Eva Jackson, alleges that she received an injury by accident on September 23, 1929, about 11:30 a.m., which caused mitral regurgitation of the heart. Plaintiff was regularly employed by the defendant at the time.

Plaintiff first entered the employment of the defendant as a reeler, and because of an injury to her finger, not sustained as a result of her employment, she was transferred to another class of work. This work required her to carry baskets of spools from a platform to the reeler, approximately fifty feet. She served twenty-four girls. The baskets weighed approximately ten pounds empty, twenty-six pounds filled with full spools, and twenty pounds filled with empty spools.

Plaintiff testified that "it seemed like every time I picked up a basket or bent down everything was coming down with the basket." Plaintiff further testified there was no unusual happening other than the usual lifting of the baskets.

J. T. Wood, master of the reeling room, testified that he estimated that plaintiff had to make from eighty to ninety trips daily with the baskets. He said the baskets stacked three high were three and a half feet to the top. The platform was about six inches high, making four feet.

Saturday, September 21, plaintiff commenced carrying baskets. Plaintiff worked from seven a.m. to one-thirty p.m. this day. Machines were cleaned from twelve o'clock noon to one-thirty p.m. About eleven-thirty a.m., Monday, the 23rd, plaintiff alleges the injury.

The record shows that the notice to employer was made October 4, 1929.

The average weekly wages were $9.36. The medical bills have not been paid by the carrier.

From the evidence in this case, the Commissioner makes the following

Findings of Fact

1. That plaintiff and defendants have accepted the Compensation Act, and the Travelers Insurance Company is the carrier.
2. That there was no accidental injury September 23, 1929, arising out of and in the course of said plaintiff's employment by said defendant-employer to cause mitral regurgitation of the heart.
3. That plaintiff's average weekly wages are $9.36.
4. That the medical bills have not been paid by carrier.

Conclusions of Law

The plaintiff has failed to show that there was an accident arising out of her employment September 23, 1929, that would cause a leaking heart. Therefore, the case is dismissed. Each side will pay its own costs.

[Docket No. 100]

SYDNEY RAMSEUR, Plaintiff, v. S. E. ICE UTILITIES CO., Employer, and SOUTHERN SURETY COMPANY, Carrier, Defendants

Filed January 6, 1930

Payments.—Compensation due under the Act must be paid in accordance therewith or carrier will be subject to penalties.

Lump Sum.—Settlements for future payments due in a lump sum must be submitted to the Commission for approval.

Hearing before E. W. Price, Deputy Commissioner, at Charlotte, Mecklenburg County, N. C., on December 9, 1929.

Plaintiff appeared in person.

Defendants represented by *Judge F. B. Helms.*

Opinion by Allen, Chairman.

Opinion by the Commissioner

This claim grows out of an injury by accident to the plaintiff, occurring on September 5, 1929, as a result of which the employer and carrier entered into an agreement on September 16, 1929, with the plaintiff for the payment of compensation during temporary total disability. This agreement was not submitted to the Commission until introduced at this hearing. The carrier defendant paid by draft in the amount of $20.50 compensation thereunder for the period from September 12 to September 28, two and one-quarter weeks by draft payable to the plaintiff. This draft was drawn by the carrier, presumably to cover the entire period of disability to which the plaintiff would have been entitled, based upon an estimate of the physician who was treating plaintiff for the injuries sustained, which opinion was that the disability would extend for a period of a week subsequent to the date of making this settlement for compensation. This being an effort to effect a lump sum settlement and compromise with the plaintiff as to his future rights to compensation. This lump sum settlement was not submitted to the Commission for approval before payment, nor was a final receipt obtained for any such settlement. At the time of drawing the draft for $20.50 in favor of the plaintiff, who was then with the carrier's representatives, instead of delivering the draft to the plaintiff, the carrier mailed the draft to the employer so that certain indebtedness claimed as due the employer could be deducted from the proceeds thereof before making payment to the plaintiff of compensation due. The employer deducted $16.00 and paid the plaintiff $4.50; later the employer repaid the plaintiff $11.00 of the amount deducted and the plaintiff testified he was indebted to the employer in the amount of $5.00 cash advanced and was agreeable to the deduction of this amount, so that the plaintiff had at the time of the hearing received $20.50 to apply on compensation.

No further compensation was tendered the employee and no request was made of this Commission to discontinue payments of compensation under the agreement entered into on September 16, 1929.

It was not until the plaintiff requested the hearing conducted in this case that the Commission knew that payments had not been continued under the agreement.

It was in evidence that the plaintiff, acting upon the advice of the attending physician, attempted to work one and one-half days on September 18 and had since that time performed three and one-half days work.

Upon the hearing it was developed that the physician who made the estimate of the termination of disability did so over the telephone and without an examination made of the plaintiff.

Attending physician, on the date of the hearing, made for the first time an examination of plaintiff at the request of the Deputy Commissioner conducting the hearing and testified that from such examination in his opinion the plaintiff could not do a full day's work without the aid of a rubber bandage, but with this bandage he would not be further disabled.

The insurance carrier defendant had been endeavoring to handle all compensation adjustments in this state through its Atlanta, Georgia, office, mainly by correspondence. However, just recently they have opened an adjustment office in Charlotte. This attempt at conducting the adjustment of this case from such a great distance no doubt accounts for the resulting confusion and delay as well as improper handling.

The Commissioner has discussed the details of the handling of this claim to such great length in order to emphasize several views expressed in his conclusions of law and to stress the importance of carriers, when handling compensation cases, following the requirements of the Act and the rules of the Commission promulgated thereunder.

Upon all the evidence in the case, the Commissioner makes the following

Findings of Fact

1. That the plaintiff and defendant Southeastern Ice Utilities Company have accepted the provisions of the Compensation Act and that the Southern Surety Company is the employer's insurance carrier.
2. That the plaintiff on September 5, 1929, while in the employ of the defendant, Southeastern Ice Utilities Company, sustained an injury by accident that arose out of and in the course of plaintiff's employment.
3. That as a result of said accident the plaintiff has been totally disabled from September 5 to December 9, 1929, except for a period of five-sevenths week and will be disabled thereafter unless the defendants have provided a rubber bandage necessary to relieve such disability.
4. That the plaintiff and defendant on September 16, 1929, entered into an agreement for the payment of compensation for temporary total disabilty, which was not submitted to the Commission until date of hearing, however, the same is approved except as to the lump sum settlement and termination of disability.
5. That the plaintiff has been paid $20.50 as compensation under said agreement.
6. That no final receipt has been signed nor have defendants requested permission from this Commission to suspend payments under said agreement.
7. That no payments of compensation have been made since September 28, 1929.
8. That on December 9 there was due and unpaid under this said agreement weekly payments totalling $96.50.
9. No request has been made upon the Commission to excuse nonpayment of compensation due.

Upon the foregoing the Commissioner bases the following

Conclusions of Law

Section 18½ provides that compensation due under the Act shall be paid *periodically*, promptly, and directly to the person entitled thereto.

Section 21 provides that no claim for compensation under the Act shall be assignable.

Section 42 provides that any payment made by an employer when not due and payable when made under the Act cannot be deducted from the amount to be paid as compensation without the approval of the Commission.

Section 29 provides for payments for incapacity to work resulting from injury of a weekly compensation during total disability.

Section 44 provides that the periodic payments of compensation cannot be paid in a lump sum without the approval of the Commission.

No comment on the part of the Commissioner is necessary upon the consideration of the facts in this case in connection with the above sections of the Act relates to the deductions made by the employer and failure of the carrier to see that the injured employee received the compensation payments when due; as well as making unauthorized lump sum payments.

Section 57 provides that either party, after an agreement has been entered into, and payments of compensation thereunder made, and the parties disagree as to the continuance of payments, may apply for a hearing before this Commission.

Conceding as the carrier contends that the payment made was a final payment of compensation, there has not been filed with the Commission a final receipt on form prescribed by the Commission within sixteen days after final payment, which failure could subject the defendants to a civil penalty in the amount of $25.00, as prescribed by Section 18½ (e).

It can hardly be urged on this record, that disability had terminated prior to December 9, 1929.

Upon the foregoing the Commission orders that there be issued the following

Award

That the defendants pay plaintiff compensation at the rate of $9.00 per week, for a period of thirteen weeks from September 5, 1929; that the defendants pay all medical expense incurred, plus cost of rubber bandage necessary to terminate disability. Credit be allowed in the settlement for $20.50 already paid by the defendants.

Defendants to pay the costs of this hearing.

[Docket No. 65]

MRS. WILLOW BALLARD, Employee, Plaintiff, v. CANNON MILLS COMPANY, Employer, Self-Insurer, Defendant

Filed January 15, 1930

Review.—Hearing Commissioner's findings and conclusions affirmed.

Disease.—Syphilis accellerated to stage of disability by accident compensable.

Review before the full Commission, Raleigh, N. C., on December 16, 1929.

Plaintiff represented by *Armfield, Sherrin & Barnhardt*, Attorneys.
Defendant represented by *Mr. W. H. Beckerdite.*

Opinion for full Commission by Allen, Chairman.

Statement

The claimant was regularly employed by the Cannon Mills Company, and while engaged in the performance of her duties received a slight bruise or injury to her left ankle, which injury admittedly arose out of and in the course of her employment.

It appears from the evidence that the claimant, at the time of the injury, was suffering from syphilis; that the injury would not have been serious but for the diseased condition of the claimant; that the left ankle has abscessed, and the tendons and tissues on the front of the foot have sloughed off, causing from fifteen to twenty per cent disability or loss of use.

From the evidence, which is uncontradicted, Commissioner Dorsett found as a fact that the immediate cause of claimant's present disability was the syphilitic condition, but that the injury sustained on September 19, 1929, was a contributing cause to the disability, and that the preëxisting disease was accelerated by the accident, which was a direct contributing cause.

Conclusions of Law

This case presents for the first time before the North Carolina Industrial Commission the question of whether or not compensation will be allowed for the acceleration and aggravation of a preëxisting disease, caused by an accident in the regular course of employment.

The established rule that the fact that an employee was suffering from a diseased condition does not necessarily bar him or her from the rights of compensation in case of an injury and disability, but that an award may be had in case of a disability which was proximately caused by an accident or personal injury arising out of and in the course of employment, which accelerated or aggravated an existing disease, has been affirmed by the Courts of last resort in the states of Alabama, California, Connecticut, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New York, North Dakota, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, and Washington, (See 60 A.L.R., p. 1300). But, when the incapacity is primarily due to disease, or to the physical condition of the employee at the time he or she was doing the usual and ordinary work, compensation can not be recovered.

In the case of *Indianapolis Abattoir Company v. Coleman*, 65 Ind., A.P.P., 369, 1-7 N.E. 502, it was held that the existence of syphilis will not prevent an award if an accident accelerated a disease to a stage of disability. See also in this connection *Pinion Queen Mining Company v. Industrial Commission* (Utah) 204 P.A.C. 323; *Finkleday v. Heide*, 230 N. Y. 598; *Hanson v. Dickinson*, 188 Iowa 728, 176 N.W. 823.

Commissioner Dorsett, in his opinion, has cited a number of authorities upon this subject, all of which have been considered by the full Commission, with the result that the Commission approves and affirms in full the findings of fact, conclusions of law, and award of Commissioner Dorsett, and adopts them as the findings of fact, conclusions of law, and award of the full Commission.

[Docket No. 40]

ROBERT BOOZER HARDEN, Deceased, Employee; AMY BOOZER HARDEN, Widow; WILL BOOZER HARDEN, Minor Son, Plaintiffs, v. THOMASVILLE FURNITURE COMPANY, Employer, and HARTFORD ACCIDENT AND INDEMNITY COMPANY, Carrier, Defendants

Filed January 15, 1930

REVIEW.—Hearing Commissioner's findings and conclusions adopted.

NIGHT WATCHMAN.—While on duty night watchman shot from ambush as result of ill feeling over matters personal to deceased and assailant, death not a result of an accident arising out of the employment.

Review and opinion: Before the full Commission, at Raleigh, N. C., on the 16th day of December, 1929.

Plaintiff represented by *Walser & Walser*, Attorneys, of Lexington, N. C.
Defendant represented by *Spruill & Olive*, Attorneys, of Lexington, N. C.

Opinion for the Full Commission by ALLEN, Chairman.

Statement of the Case

On the night of August 2, 1929, between one and two-thirty o'clock a.m., Robert B. Harden, while engaged as a night watchman by the defendant, Thomasville Furniture Company, and while on duty, was shot and killed by one Odell Bruton; Bruton, the assailant, was later tried and convicted of murder in the second degree and sentenced to thirty years imprisonment in the State Penitentiary. The assailant, Bruton, was also in the employe of the defendant, Thomasville Furniture Company, but worked during the day time.

The evidence tended to prove that the deceased, Harden, had been attentive to the wife of Bruton, and that there was ill feeling between the two men; that Bruton had reported to police officers that the deceased, Harden, had been attentive to his wife, and that Harden had threatened to kill him, and was in the habit of carrying a pistol; that on the night of the homicide the assailant, Bruton, when he returned from work found his wife away from home, and was advised that she had gone to South Carolina; that he brooded over her absence, and the attention paid her by Harden, until past midnight, and in the early morning hours, between one and two o'clock, he armed himself and walked to the Thomasville Furniture Company's plant with the intention of talking to the deceased, Harden; that he waited in the dark and watched the deceased make several rounds in the performance of his duties; that after waiting for a period of about an hour, the deceased came near the assailant, and immediately the assailant shot him twice, and immediately thereafter went to his home.

There was no evidence of any quarrel or ill will between the two men concerning any matter connected with their employment.

Upon all of the evidence, Commissioner Dorsett found as a fact that the shooting was done from ambush, and that the death of Harden was not the result of an accident arising out of the employment by the defendant, Thomasville Furniture Company; and that the shooting was the result of personal ill will, completely disassociated from the employment.

Conclusions of Law

The Commission has carefully considered all of the evidence, together with the briefs and argument of counsel, and can find no reason to justify any modifications of the findings and conclusions of Commissioner Dorsett.

An injury is received in the course of the employment when it comes while the employee is doing the duty which he is hired to perform. It arises out of the employment only when there is a causal connection between the conditions under which the work is done and the resulting injury.

As stated by Commissioner Dorsett, in his opinion, "The causative danger must be peculiar to the work, and not common to the neighborhood, and it must appear to have had its origin in the risks connected with the employment, and to have flowed from that source as a rational consequence."

An injury which can not be fairly traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workman would have been equally exposed apart from the employment, is not compensable.

The findings of fact, conclusions of law, and award, of Commissioner Dorsett, are hereby affirmed and adopted as the findings of fact, conclusions of law, and award, of the full Commission, and an award will accordingly issue in accordance with this opinion.

[Docket No. 171]

MORRIS L. PORTER, Employee, Plaintiff, v. JENNINGS COTTON MILLS, INC., Employer, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Carrier, Defendants

Filed January 15, 1930

TESTICLE.—Where no specific provisions made for loss of portion of body and no proof of impared earnings. Claim denied for both disability compensation and disfigurement.

Hearing held before MATT H. ALLEN, Chairman, 3:30 p.m., January 21, 1930, at Lumberton, N. C.

Plaintiff represented by *John G. Proctor*, Attorney, Lumberton, N. C.

Defendants represented by *L. R. Vasser*, Attorney, Lumberton, N. C.

Opinion by ALLEN, Chairman.

Statement of the Case

This was a claim from Robeson County, for compensation for loss of a testicle upon the grounds that the loss of a testicle constituted the loss of a member and/or bodily disfigurement.

It was admitted that plaintiff had been paid compensation for disability up to and including the date on which he returned to full wage duty, thus leaving the one question for determination, to wit: Is the loss of a testicle compensable under the Workmen's Compensation Act in the absence of proof of loss of earning capacity caused by the loss of the member?

There is no specific provision in the North Carolina Act for the loss of a testicle.

It must be conceded that this claimant has sustained a permanent partial disability, but where an award is sought for such disability, including any disfigurement which may impair the usefulness or opportunity of the injured employee, and the Legislature has not specifically provided for the particular injury complained of, the fact of disability and resulting diminution of earning power must be established as a matter of fact, for the Act does not give compensation for the loss of this member, and the Commission can only compensate in such case where there is established a loss of earning capacity caused by the loss of the member.

All the evidence in the case tends to show that the earning capacity of the employee has not been impaired, and the medical testimony was to the effect that his physical and sexual power had not been impaired. It further appears from the evidence that the claimant is receiving the same wage as before the injury, which fact strongly indicates that his earning power has not been lessened. Without such loss of earning capacity there is no provision in the North Carolina Act for compensation, although permanent physical injury may have been suffered, and the burden is upon the petitioner to show the loss, and with reasonable definiteness—its amount.

It has been held by some of the Courts that the loss of a testicle is compensable upon the theory that the criterion of disability partial in character, and permanent in quality, is not limited to loss of earning capacity. (*Kostida v. Dept. of Labor and Industries* (Wash.) 247 Pac. 1014; *Hercules Powder Co. v. Morris County Court*, 93 N.J., L. 93; *Clark v. Kennebee Journal Co.* (Me.) 113 Atl. 51). Other jurisdictions have held that where there is no specific provision for loss of the member the Act is not exclusive as to the particular injury, and the claimant may prosecute his claim at common law.

We have examined all of the authorities available upon the subject, and our conclusion is that the weight of authority seems to be that for any partial disability, not specifically provided in the Statute, compensation should be determined by proof of impairment of earning power.

Award

It is ordered that an award issue denying compensation.

[Docket No. 131]

FRANK CHADWICK, Employee, Plaintiff, v. MENHADEN CORPORATION, Employer, and EMPLOYERS' LIABILITY ASSURANCE CORPORATION, Carrier, Defendants

Filed January 18, 1930

HERNIA.—Existence of hernia prior to accident is bar to compensation.

Hearing held before MATT H. ALLEN, Chairman, Office Clerk Superior Court, Wilmington, N. C.

Plaintiff appeared in person.
Defendants represented by *Mr. C. L. Lyon.*

Opinion by ALLEN, Chairman.

This was a claim from New Hanover County, for compensation for hernia.

It was admitted that plaintiff was in the employ of the defendant at the time of the alleged injury, and that his average weekly wages amounted to three dollars and fifty cents ($3.50) per day.

The plaintiff testified that on October 19 he was engaged by the defendant, Menhaden Corporation, as a carpenter, and while prying boards with a piece of 4x8 timber, the timber slipped and struck him in the stomach; that at the time he hoped that he was not much hurt; that he told a Mr. Burton about it; that the accident occurred about one-thirty o'clock Saturday afternoon; that he continued to work around until three o'clock; that he remained at home on Sunday and consulted a doctor on Monday; that immediately following the accident he did not experience any severe pain, but did feel pain like a pin scratch; that during the month of July while taking a bath he noticed a little knot in his groin about the size of a marble and told his wife about it, and that his wife suggested that he probably had a hernia; that the lump, or knot, was on the same side of the hernia now complained of, but not exactly at the same point.

In a written statement by the claimant on October 24, and within five days after the accident, he stated that the last injury caused a larger lump to come over the smaller one.

Dr. Codington testified that he examined the plaintiff, and that in his opinion the hernia was a recent one; that during his examination plaintiff told him of the knot or lump that he previously had, and that plaintiff thought his present trouble might be the same thing; that if plaintiff had been hurt by a blow from a piece of timber in the manner described, it was his opinion that the protrusion would have appeared almost immediately.

Section 2 (r) of the Workmen's Compensation Act provides "in all claims for compensation for hernia or rupture resulting from injury by accident arising out of and in the course of the employment must be proven to the satisfaction of the Industrial Commission.

1. That there was an injury resulting in hernia or rupture.
2. That the hernia or rupture appeared suddenly.
3. That it was accompanied by pain.
4. That the hernia or rupture immediately followed an accident.
5. That the hernia or rupture did not exist prior to the accident for which compensation is claimed."

The burden of proof is therefore upon the claimant to establish definitely the five requisites, and upon failure to do this compensation must be denied.

In the case of *Holderfield v. Briggs Shaffner Company*, Docket No. 13, filed September 28, 1929, this Commission held that hernia will only be considered accidental under the North Carolina Compensation Act where there is real traumatic hernia resulting from the application of force directly to the abdominal wall, either puncturing or tearing the wall, and that all other cases would be considered as either congenital or of slow development, being a disease rather than an accidental injury.

In the case of *Thompson v. Fogel Brothers, et al.*, Docket No. 3, filed October 21, 1929, it was said by this Commission that "the medical profession seems to be in agreement that very many persons have a predisposition or congenital condition that often develops into hernia, independent entirely of any accident." Most such persons frequently find that hernia has developed while the person is incapacitated in his ordinary occupation, and the natural tendency is to try to explain the existence of the hernia by some unusual circumstance, such as slipping or lifting, or some other circumstance of similar nature.

Upon consideration of all of the evidence in this case, the Commissioner finds as a fact that the hernia or rupture complained of existed prior to the accident for which compensation is claimed, and that the hernia or rupture did not immediately follow an accident.

It is therefore ordered that an Award issue, denying compensation.

[Docket No. 32]

ORMOND E. CHAMBERS, Plaintiff, v. UNION OIL COMPANY, INC., and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed January 20, 1930

HORSEPLAY.—A moment's diversion from work to joke or play a prank upon a fellow employee is reasonably to be expected and is one of the perils of the service, a course of sportive conduct among employees becoming a fixed habit or custom with the knowledge and acquiesence of the employer is a peril of the work and resulting injury arises out of and in the course of the employment.

GUNSHOT INJURIES.—Accidental discharge of gun by a co-employee during course of employment and under facts of this case held to arise out of employment.

Hearing before Commissioner ALLEN at Asheville, Buncombe County, N. C., October 16, 1929.

Plaintiff represented by *Mr. Chas. G. Lee, Jr.*, of Asheville, N. C.

Defendants represented by *Mr. M. L. Page, L. B. Carpenter, J. M. Horner, Jr.*

Opinion by ALLEN, Commissioner.

It was admitted that the plaintiff was regularly employed by the defendant Union Oil Company, at the time of plaintiff's injury, and that the Maryland Casualty Company had insured the compensation liability of the Union Oil Company, and that the plaintiff's average weekly wage could be determined from his monthly salary, which was $150.00 per month. It was agreed that the only point in issue was as to whether or not the accident arose out of and in the course of the plaintiff's employment.

The evidence at the hearing was to the effect that the plaintiff and F. E. Loven, both of whom were truck drivers for the Union Oil Company, wholesale distributors of oil, had for some time carried pistols in their trucks for the alleged purpose of protecting the company's property against robbery; that the plaintiff has carried a pistol on his truck for the last eight or nine years, and that Mr. Loven had carried a pistol on his truck since he was held up several months previous; that these truck drivers closed practically all cash sales. The plaintiff testified that the company furnished him with change in amounts ranging from $2.00 to $800.00. The evidence further showed that H. W. Parker, vice president of Union Oil Company, thought the drivers were carrying pistols, but had no positive knowledge of that fact; that one of the drivers had reported to him that he had been held up some time ago; that Parker had never forbidden the carrying of pistols by these drivers, nor had he directed them to go armed. That on the 7th day of September, 1929, the plaintiff was filling a fuel tank on the truck, when Loven went to his truck to get his order book, which was in the pocket of the truck under his pistol; that Loven took the pistol out of the truck and plaintiff asked him where he was going with "that old smoke pole" and that "that old gun won't shoot," or words to that effect, and he (Loven) threw the pistol back and it accidentally discharged; that he (Loven) had removed all shells from the pistol except one, and was about three or four feet from plaintiff's truck, and about two steps from his own truck, at the time of his conversation with the plaintiff; that in answer to plaintiff's question he replied that he was going to Mars Hill; that he went over to where the plaintiff was for the purpose of showing him the pistol, and they were standing side by side when the pistol discharged, the bullet entering plaintiff's foot. It was also in evidence that on his trip to Mars Hill, a distance of about twenty-one miles, Loven had several stops to make and at that time carried a considerable sum of money—two or three hundred dollars. The defendants endeavored to show that the plaintiff and Loven had said something about trading pistols, but no evidence to that effect was produced.

It was agreed between the parties at the hearing that the Commission would be furnished the affidavit of the doctor who attended the plaintiff, which statement would explain the character of plaintiff's injury, the probable duration of total disability, and partial disability, together with a statement of the hospital and doctor's bills, so the Commission might have a complete record. It was also agreed by the parties, and ordered by the Commissioner, that the doctor's affidavit be made a part of the record.

The affidavit of Dr. Joseph L. Adams, dated November 12, 1929, sworn and subscribed to by him before the Clerk of the Superior Court for Buncombe County, North Carolina, and which pursuant to the agreement and order hereinbefore referred to, has been made a part of the record of this case, states that Dr. Adams is a practicing physician in the City of Asheville; that on the 7th day of September, 1929, he was asked to professionally attend one Ormond E. Chambers, who had sustained a severe gun shot wound in his left foot; that the said Chambers was confined in the French Broad Hospital from September 7, 1929, continuously through October 3, 1929; that an X-ray of the injured foot showed a compound fracture of the metatarsal bone, the second metatarsal having been completely shattered; that there were scattered metal particles along the tract of the bullet, and that an operation on the injured foot was necessary in order to remove the bullet; that affiant believes the said Chambers will be totally disabled for a period of at least from five or six months from the date of the injury, and that at present the said injured party has not even the partial use of his left foot; that the injured foot, from the date of the accident until now has been in a plaster cast, and affiant is unable to state with any degree of correctness when the cast can be removed; that affiant's charge to date for medical services amounts to $150.00 plus charges for all dressings from the date of the injury, and that it is impossible for the affiant to determine the exact number of dressings which will be necessary; that affiant has been informed that the hospital bill to date amounts to $162.65; that affiant is of the opinion that it is absolutely impossible for the said Chambers to do, at the present time, the work that he was doing at the time of the injury, to wit, driving a truck for the Union Oil Company.

On the 27th day of November, 1929, additional evidence in the form of depositions was taken by Nina W. Harrison in the presence of counsel for plaintiff, and defendants, the witnesses examined being Ormond E. Chambers, the plaintiff, L. B. Carpenter, and P. E. Loven. The only additional evidence presented by these depositions which is of material assistance to the Commissioner in the consideration of this case was to the effect that Mr. Loven, after removing the pistol from the left-hand pocket of his truck to get his order book, carried the pistol around the truck, with the evident intention of placing it in the right-hand pocket; that the truck seat was wide enough to accommodate three persons, and because of the distance and the further fact that the "gears" were in the way, it was impossible to have moved the pistol from the left-hand pocket to the right-hand pocket without leaving the cab; that it was while thus carrying the pistol the conversation referred to in the hearing occurred; that the pistol was discharged *accidentally* with no intention of doing so, and that if the trigger was pulled Mr. Loven had no recollection of it, and at the time of the accident had not intended discharging the weapon; that the pistol was not concealed in the truck, but was always so placed in the shallow pocket of the truck as to leave the handle of the pistol exposed; that Mr. Carpenter, counsel for the defendants, interviewed Mr. Loven on September 10, while the latter was working on a truck on Depot Street, Mr. Carpenter testifying that at that time Mr. Loven told him he had tossed the pistol back on the seat of his truck after getting his order book, but at Chambers' suggestion he got the pistol again, took it over to where Chambers was, Chambers asking him to pull the trigger to see if the pistol would shoot, which he did, all of which followed a conversation about trading pistols; that Loven recalled the interview with Carpenter, but denied having heard the latter ask about having thrown the pistol back on the seat and getting it down again at Chambers' request, saying that if Carpenter did ask him about those matters he did not hear him, and if he told Mr. Carpenter he pulled the trigger he did not recall it as he was busy at the time, and that he would rather wait and see him some other time when he could have time to talk with him.

From a consideration of all the evidence the Commissioner finds that the plaintiff sustained an injury on the 7th day of September, 1929, which injury arose during the course of the employment; that the employer had not forbidden the carrying of pistols by its truck drivers, but in fact thought pistols were being carried by them; that inasmuch as the employer thought the drivers were carrying pistols and took no action to discourage the practice is tantamount to sanctioning such practice, and that by such sanction the ordinary dangers from such use of pistols become hazards incident to the plaintiff's employment, hazards to which the general public is not exposed; that the accident arose out of the employment, therefore, as well as in the course of the employment; that the burden was upon the defendants to prove the alleged "horseplay" which consists of "sky larking" or "sportive acts"; that the defendants have failed to establish the fact of "horseplay"; that at the time of the accident neither the plaintiff nor Loven had abandoned his employment; that by the greater weight of the evidence the plaintiff has met all of the requirements of the North Carolina Workmen's Compensation Act, and is entitled to recover.

It is admitted in this case that claimant was at all times during the conversation betwen himself and his co-employee, actually engaged in the filling of a tank with oil, so it cannot be said by any view of the evidence that claimant participated in any kind of sky larking or play. Some of the Courts hold that where an employee is injured as a result of horseplay of fellow employees in which he is not participating, his injury is the result of accident arising out of and in the course of his employment.

A distinction must be drawn between the doing of a thing recklessly or negligently, and the doing of a thing altogether outside and unconnected with the employment.

Where a workman, while going about his duties, is the victim of another's pranks, to which he is not a party, he should not be denied compensation, O. I. C. of Virginia, Volume 111, p. 67.

Where an employee, while engaged in his regular work, was struck in the eye by an apple thrown by a fellow servant engaged in horseplay, the New York Court of Appeals in *Lennbruns v. Champlain Silk Mills*, 128 N. E. 711, said; "that it (the accident) arose in the course of employment is unquestioned. That it arose out of the employment is now held. The claimant's presence in a factory, in association with other workmen involves exposure to the risk of injury from the careless acts of those about him. He was brought by the condition of his work within the zone of danger. Whatever men and boys will do when gathered together in such surroundings, at all events, if it is something reasonably to be expected, was one of the perils of the service. We thing with Kelisch, J., in *Hulley v. Moosbrugger*, 87 N. J., Law 103, 93 Atlantic 79, that it was but natural to expect them to deport themselves as young men and boys replete with the activities of life and health. For workmen of that age, or even maturer years, to engage in a moment's diversion from work to joke with or play a prank upon a fellow workman is a matter of common knowledge to everyone who employs labor. The claimant was injured not merely while he was in a factory but because he was in a factory in touch with associations and conditions inseparable from factory life. *The risks of such associations and conditions were risks of the employment.*

The Industrial Commission of Virginia has gone so far as to approve the decision in the case of *Kokomo, etc., Company v. Irick*, 141 N. E. 796, wherein it was held that where a course of sportive conduct among employees *has become a fixed habit or custom, with the knowledge and acquiescence of the employer*, it is then one of the perils of the work, and an injury resulting therefrom arises out of the employment.

The general rule is that accidents occasioned by horseplay between the injured employee and a fellow servant are not compensable. However, if it is shown that the employer has knowledge of this practice and takes no steps to prevent it by promulgating rules forbidding it, or otherwise, injuries so received are compensable. O. I. C. of Virginia, Volume VIII, p. 415, citing *Bullock v. Richmond Cedar Works*, 2 O. I. C., VIII.

In this case it is ordered that an Award be isued, directing the defendants to pay to the plaintiff compensation at the rate of $18.00 per week, payable weekly, beginning from September 7, 1929, and continuing during the period of plaintiff's total disability, but for a period not to exceed four hundred weeks, and that the defendants pay the cost of all medical, surgical and hospital treatment heretofore rendered and hereafter necessary when and as bills therefor shall have been approved by the Commission.

It is further ordered that the defendants pay the cost of this hearing.

This cause is retained for further orders and Award when the disability of claimant shall have assumed a permanent status.

[Docket No. 153]

MISS NORA KEENE, Employee, Plaintiff, v. MRS. J. NAPIER, Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Carrier, Defendants

Filed January 20, 1930

TERMINATION OF DISABILITY.—If evidence does not show disability terminated prior to examination made upon directions of hearing Commissioner award will issue for termination on date of examination.

Hearing before MATT H. ALLEN, Chairman, North Carolina Industrial Commission, held at 2:30 p.m., January 6, 1930, Office C. S. C., Wilmington, N. C.

Plaintiff appeared in person.
Defendants represented by *K. O. Burgwin*, Attorney, Wilmington, N. C.

Opinion by ALLEN, Chairman.

Statement of the Case

This was a claim from New Hanover County for compensation for injury resulting from an accident which is alleged to have occurred on July 13, 1929.

It appears from the evidence that on July 13 the claimant was employed as a stewardess at the boarding house of Mrs. J. Napier, at Wrightsville Beach, N. C., and that while engaged in the performance of her duties one of the waiters accidentally ran into her and knocked her down, injuring her hip and incapacitating her for work for a period of three or four days; that on July 17 she returned to her work and continued to work until September 5; that on July 14 claimant consulted Dr. L. E. Farthing, of Wilmington, who made an examination and X-ray and found a slight skin wound on the right hip, with a fracture of the greater trochanter on the outer side extending ¾ of an inch into the bone; that the claimant at the time of her injury was receiving $15.00 per week, and board estimated at $7.00 per week; that on September 1 claimant and the defendant entered into an agreement for compensation for disability, by the terms of which the claimant was to receive compensation for 4/7 of a week; that a certificate of termination of disability was filed by Dr. L. E. Farthing on November 8, 1929, in which it was stated that the claimant was able to return to work on August 24 and with the further statement that: "this patient left the hospital against my advice, and returned to work earlier than she should, which aggravated the condition somewhat, otherwise she would have recovered sooner"; that claimant gave up her work on September 5, due to pain and discomfort in her right hip.

On December 2, 1929, the claimant requested that her claim be assigned for hearing, and it was heard on January 6, 1930.

There was evidence tending to prove that the plaintiff during September and October undertook to work for several persons, and that she complained in each instance of pain and swelling in the hip, and was unable to carry on her work. Dr. L. E. Farthing testified that he examined the plaintiff on July 14, and found a fracture of the greater trochanter on the outer side of her right hip, with an abrasion on the leg over the fracture; that he advised claimant that she would be able to return to work in about five or six weeks; that claimant left the hospital after two or three days; that he did not see her again until some time in September, and he made a second examination, and that the second examination revealed no evidence of injury.

Dr. J. W. Hooper testified that he was called upon to examine the claimant on November 14, and made an X-ray pcture and found everything subjective and nothing objective; that claimant did not complain of her knee or any other injury except her hip; that the X-ray taken in July did not definitely show a fracture of the bone, but that he gave the patient the benefit of the doubt; that the injury was not permanent; that if there was a fracture on July 13 it should have healed within six weeks; that if the bone had been fractured on July 13 the patient could not have returned to work within three or four days; that if there had been any infection the X-ray would have shown it; that the injury complained of could not have caused a rheumatic condition.

At the close of the testimony the Commissioner directed the claimant to report to Raleigh, N. C., for examination and X-ray by Dr. Wm. E. Dewar, and the report of Dr. Dewar is attached to and made a part of the record of this case, which report shows that there was found no evidence of any bone injury on date of examination, January 8, 1930.

It was admitted that all parties were subject to the provisions of the Workmen's Compensation Act.

Findings of Fact

Upon consideration of all the evidence, the Commission finds as a fact that the claimant sustained an injury to her hip on July 13; that she returned to work on July 17, while still suffering from this injury; that she continued to work until September 5, and that the work aggravated the injury, and prevented a complete recovery; that between July 13 and September 5 claimant received a salary of $10.00 per week, plus board amounting to $7.00 per week; that between September 5, and the date of the hearing and examination by Dr. Dewar, the claimant suffered from said injury and was unable to perform her duties as a stewardess; that the Commission is unable to determine the exact time of the termination of the disability; that on January 8, 1930, her disability had terminated; that the claimant is entitled to compensation from September 5, 1929, until January 8, 1930, at the rate of $13.20 per week, plus medical and hospital bills.

It is thereupon ordered and adjudged, that an Award issue providing for the payment to the plaintiff of compensation for a period of 17 6/7 weeks, at the rate of $13.20 per week, payment to begin upon the 5th day of September, 1929, and to continue weekly for the period.

[Docket No. 105]

J. H. LEWIS, Plaintiff, v. CITY OF HIGH POINT, Employer, and HARTFORD ACCIDENT AND INDEMNITY COMPANY, Carrier, Defendants

Filed January 22, 1930

HEARINGS.—Will be conducted in summary manner and in such manner as to ascertain the substantial rights of the parties, with right to consider every possible view and determine all necessary questions so that complete determination within limits of Act may be had.

REVIEW.—Hearing Commissioner's findings and conclusions affirmed.

PENALTIES.—Failure to make payments when due unless permission granted to discontinue payments by Commission subjects carrier to 10 per cent penalty.

Hearing before the full Commission, January 20, 1930.

Plaintiff represented by *Walser & Casey*, of High Point, N. C.

Defendants represented by *Mr. A. W. Sapp*, of *King, Sapp, and King*, of Greensboro, N. C.

Opinion for the full Commission by DORSETT, Commissioner.

This is an appeal by the defendants from an award made as directed in an opinion by Chairman Allen, filed December 28, 1929. In their brief the defendants state two propositions as grounds for setting aside the award made on January 2, 1930.

(a) "That they were not placed on notice that the hearing conducted at High Point was for any other purpose than to determine if total disability had terminated"; "which terminated August 9, 1929."

(b) "That if the Commission is to take such complete authority of the hearing that the carrier should be appraised of this fact, and be allowed to contest a claim of this nature in all its aspects."

The full Commission after reviewing the evidence taken before the Deputy Commissioner on December 10, 1929, at High Point, N. C., which has been duly certified to the Commission as required by Statute, finds that the Findings of Fact as set out in the opinion filed by Chairman Allen on December 28, 1929, are supported by the greater weight of the evidence and hereby adopts those Findings as its Findings of Fact, and affirms the same. Supplementing those Findings, the full Commission believes that a short statement of the Commission's file concerning the case will be of interest and give a better understanding of the other portions of this opinion.

The plaintiff on July 10, 1929, while in the employ of the City of High Point, N. C., as garbage man, sustained a broken clavicle. Under date of August 1, 1929, the parties entered into an agreement for payment of compensation for temporary total disability, which agreement was approved by the Commission on August 20, 1929—payments of compensation were to be made at the rate of $9.90 per week, payable weekly. Under this agreement, approved by the Commission, the defendants, in accordance with the Act, should have continued the weekly payments when due; otherwise, they were subjecting themselves to payment of a penalty of 10 per cent on any unpaid weekly payments; or, within sixteen days after the final payment had been made a final settlement receipt should have been filed—failure to do this subjected them to a civil penalty in the amount of $25.00; or, permission should have been requested to discontinue payments under the award and a hearing requested because of change of condition. See Sections 18½, 46, and 57; also, Commission Rule 19.

The further findings of fact are made, that, without notice to the Commission the defendants discontinued payments on August 23, resuming payments on September 13, 1929; and again without notice to the Commission, discontinued payments on September 23, 1929, and have made no payments since that date; nor has any request been filed at any time requesting permission to discontinue the payments; nor has the carrier made any request for hearing alleging a change of condition. Under these facts the Commission feels that this case would warrant the imposition of the penalties prescribed, but have made due allowance for the inattention given this claim by the carrier's adjuster, for that procedure under the Act is an innovation in this State.

It is further found as a fact that the notice mailed the defendants of the hearing to be had on December 10, 1929, stated the subject of hearing "Plaintiff alleges permanent disability, and Insurance Company does not agree with this statement." This notice is directly contrary to the contention (a) of the defendants in their brief, and the fact that payments were made by the defendants until September 25 under the agreement is an answer to their contention that total disability terminated on August 9; however, the evidence of Dr. Jackson contains the following:

Q. "At the time was he totally disabled, the 9th of August?"

A. "That would give him a month, that is thirty days after he was injured; he could have done certain little things."

The plaintiff testified that he was not offered work by the defendants suitable to his capacity, and that as a man with the use of but one arm he had made unsuccessful efforts to secure employment suitable to his capacity; and, as stated in the opinion of Chairman Allen, the first date any fixed permanent status of the plaintiff's arm was determined, was on December 10, 1929, and the defendant had notice that this was the purpose of the hearing. The defendants cannot be heard to complain of their own laxity in handling this claim. The defendants' other proposition is an attack upon the jurisdiction of the Commission—to ascertain all the facts at a hearing had upon request of either party. This contention is not founded upon the facts, inasmuch as the notice mailed the defendants recites that plaintiff alleged a permanent disability, while this contention of the defendants pleads lack of such notice. However, the Act in Sections 54, 57 and 58, requires that hearings shall be conducted in a summary manner and in as simple a manner as reasonable. Rule 22 adopted by the Commission recites, "Such hearing shall be conducted in such manner as to ascertain the substantial rights of the parties." This Commission, until overruled in its construction of the Act, especially Section 46 as directly applicable to cases similar to the instant case, will upon its own motion or upon the application of any party interested on the ground of change of condition, review any award made, and in reviewing such award do so with the right to consider every possible view and determine all necessary questions so that the rights of all parties may be determined and the whole subject matter of the controversy, including further claims of applicant or of any and all other persons making any claims under the Act will be considered so that a complete determination of the matter in a summary manner within the limitations set by the Act may be made.

The opinion of Chairman Allen filed December 28, 1929, expresses the correct conclusions of law applicable to this case, and the full Commission hereby adopts and affirms the same and further orders that the award issued thereunder, under date of January 2, 1930, reading as follows: "That the defendants pay to the plaintiff compensation for temporary total disability from July 10, 1929, to and including December 10, 1929, at the rate of $9.90 per week, and thereafter pay compensation for 25 per cent permanent loss of use of the left arm at the rate of $9.90 per week, for a period of fifty weeks. Defendants will also pay all medical, surgical and hospital expenses, together with the costs of this hearing"—be approved and affirmed.

[Docket No. 81]

LONNIE MILLS, (Alias LAWRENCE WILSON, Colored), Deceased; ADA MILLS and Three Minor Children, HUBERT, TOMMY AND BESSIE, 1359 Conkin Street, Augusta, Ga.; BEN J. BRANTLEY, Guardian for Six Minor Children, ED LEE, LILLY MAE, ROBERT, J. B., LORINE and SARAH WILSON, Plaintiffs, v. CITY OF SALISBURY, Employer, Salisbury, N. C., and MARYLAND CASUALTY COMPANY, Carrier, Defendants.

Filed January 23, 1930

DEPENDENTS.—Legal widow and children entitled to compensation as wholly dependents, children raised in deceased home for a period of more than five years prior to death also wholly dependent and death benefits divided among the wholly dependents.

Hearing before J. DEWEY DORSETT in Salisbury, N. C., December 2, 1929, continued to Sandersville, Ga., at which place hearing was held by Deputy Commissioner SHARPE JONES of the Georgia Industrial Commission on January 4, 1930.

Ada Mills and Three Minor Children represented by *Warren & Mayo*, Attorneys, Sandersville, Ga.

Ben J. Brantley, Guardian for Six Minor Children, represented by *Judge P. S. Carlton*, Salisbury, N. C., and *Harris & McMasters* of Sandersville, Ga.

Defendants represented by *P. W. Brinkley* of Winston-Salem, N. C., and *C. E. Allen* of Atlanta, Ga., both being adjusters for the Maryland Casualty Company.

Opinion by DORSETT, Commissioner.

Opinion by J. Dewey Dorsett upon the record of the hearing held at Salisbury before that Commissioner, and the transcript of the evidence heard by the Deputy Commissioner of the Georgia Industrial Commission which has been duly certified to this Commission, the Commissioner makes the following:

Statement of the Case

The deceased, Lonnie Mills, alias Lawrence Wilson, on October 12, 1929, while in the employ of the defendant City of Salisbury, N. C., happened to an accident that resulted in his death. No contention is made that the accident did not arise out of and in the course of deceased's employment—the only question presented is one of dependency upon the deceased at the time of his death.

The evidence tends to show that in 1909 the deceased contracted a lawful marriage with Ada Bethea from which union there was born three children, Hubert, Tommy and Bessie, who at the time of the accident were 15, 14, and 11 years of age respectively. Ada (Bethea) Mills and the deceased lived together as man and wife for a considerable time. It is in the record that the deceased abandoned his wife Ada in 1926—there is also evidence tending to show that the abandonment occurred in 1916 or 1917—the latter date being more probably the correct date. The wife Ada (Bethea) Mills and the three minor children named were living at the time of the hearing on January 4, 1930, and Ada had not divorced the deceased.

At the time of abandoning his wife, Ada, it would appear that the deceased left Washington County, Ga., with Irene Brantley, and if there was any marriage ceremony, such marriage was bigamous since there is no proof or evidence of the deceased having been divorced from his wife Ada Mills. Irene Brantley died about two years prior to the deceased's death.

There were living with the deceased in Salisbury, N. C., at the time of his death, and being supported by him for at least five years prior thereto, six children, Ed Lee, age 16; Lillie Mae, age 11; Robert, age 8; J. B., age 6; Lorine, age 4; and Sarah, age 2. These six children are now living with their uncle, Ben J. Brantley, who has made application for appointment as guardian for these minor children. As to the parentage of these six children, with this record showing the confused recollection of witnesses as to dates, and such a hopeless conflict as to dates that Solomon with all his wisdom would have difficulty in determining whether the nomadiac deceased was their father, so, the Commissioner will not attempt to determine this question since it clearly appears that these six were wholly dependent upon the deceased for more than three months preceding his death.

Upon all the evidence in the case the Commissioner makes the following

Findings of Fact

1. That the deceased, Lonnie Mills, died as a result of an accidental injury on October 12, 1929, said injury arising out of and in the course of his employment by the defendant City of Salisbury, N. C.

2. That the deceased's average weekly wage was $13.75.

3. That the City of Salisbury, N. C., had insured its compensation liability with the defendant Maryland Casualty Company.

4. That the deceased Lonnie Mills was at the time of his death living under the alias name of Lawrence Wilson; that the Lonnie Wilson reported by the defendants as being killed on October 12, 1929, in an accident while in the employ of the City of Salisbury was the same person as Lonnie Mills formerly of Washington County, Georgia.

5. That the deceased left surviving him the following dependents: Ada (Bethea) Mills, widow; Hubert, age 15; Tommy, age 14; and Bessie, age 11; minor children of the deceased, each of whom are conclusively presumed to be dependent upon him for support. Also the following minor children found as a fact to be wholly dependent upon him for a period of more than three months prior to his death: Ed Lee, age 16; Lillie Mae, age 11; Robert, age 8; J. B., age 6; Lorine, age 4; and Sarah, age 2.

Upon the foregoing Findings of Fact are based the following:

Conclusions of Law

Under Section 38, the widow and children of the deceased are presumed to be wholly dependent but this does not exclude the right of other persons to receive compensation where such persons are wholly dependent upon the deceased and have been so dependent for three months prior thereto. This Section also provides that the compensation payable shall be equally divided between wholly dependents, and since the deceased left ten persons wholly dependent at the time of his death, each would be entitled to 10 per cent of the compensation payable. Therefore, the Commissioner directs that there be issued the following

Award

That the defendants pay to Ada (Bethea) Mills for her own use and as natural guardian and for the use and benefit of her three children, Hubert, Tommie, and Bessie Mills, compensation at the rate of $3.30 per week, payable weekly, from October 12, 1929, for a period of three hundred and fifty weeks.

That the defendants pay to Ben J. Brantley of Sandersville, Ga., should he be appointed by the Ordinary or other proper official of Washington County, Ga., or in event of failure to appoint said Ben J. Brantley, thereupon to pay to such other guardian as may be duly and properly appointed by the proper official of Washington County, Ga., as legal guardian of the six minor children, Ed Lee, age 16; Lillie Mae, age 11; Robert, age 8; J. B., age 6; Lorine, age 4; and Sarah, age 2; each bearing the surname Wilson; compensation at the rate of $4.95 per week, payable weekly, from October 12, 1929, for a period of three hundred and fifty weeks, for the use and benefit of the said six minor children. Certified copies of letters of appointment as such guardian to be filed with this Commission.

The defendants will pay the proper parties funeral expenses not to exceed $200.00, out of which amount the City of Salisbury shall be reimbursed the amount of $37.69 advanced towards funeral expenses.

The defendants will also pay all proper medical and hospital bills incurred as a result of this injury.

The defendants are directed to pay Judge P. S. Carlton at Salisbury, N. C., $50.00 for attorney's fee, the same to be deducted from compensation accrued and due the guardian, Ben J. Brantley, for the six minor children—Ed Lee, age 16; Lillie Mae, age 11; Robert, age 8; J. B., age 6; Lorine, age 4; and Sarah, age 2.

Each party will pay its own costs.

[Docket No. 187]

J. I. ADAMS, Employee, Plaintiff, v. BUFFALO SNOWBIRD COMPANY, Employer, and HARTFORD ACCIDENT AND INDEMNITY COMPANY, Carrier, Defendants

Filed January 23, 1930

TEMPORARY TOTAL FOLLOWED BY SPECIFIC.—Section 29 provides without exception for total disability not to exceed 400 weeks, compensation thereunder must be paid until total disability terminates. Thereafter, in cases of specific total partial disability under Section 31, disability will be deemed to continue for periods stated, subject to maximum periods and payments provided under the Act.

Hearing in Asheville, N. C., by consent of parties before Commissioner J. DEWEY DORSETT, January 11, 1930.

Opinion by DORSETT, Commissioner.

Statement of the Case

By agreement of the parties it is admitted that the plaintiff sustained an injury by accident arising out of and in the course of his employment by the defendant Buffalo Snowbird Company on November 4, 1929, and the plaintiff was totally disabled until December 19, 1929, the sole question for determination being the extent of disability. The evidence of Dr. Mears was taken in Asheville. From this evidence, the plaintiff sustained the loss of the distal phalange of the right index finger. Upon the admissions and evidence the Commissioner makes the following

Findings of Fact

1. That the plaintiff on November 4, 1929, while in the employ of the defendant Buffalo Snowbird Company, sustained an injury by accident arising out of and in the course of his employment.

2. That said employment was subject to the provisions of the North Carolina Workmen's Compensation Act, and the defendant's liability for compensation was insured with the Hartford Accident and Indemnity Company.

3. That the plaintiff's average weekly wage was $16.50.

4. That the plaintiff as a result of said injury was totally incapacitated for any work from November 4, 1929, to December 19, 1929.

5. That as a result of said injury the plaintiff sustained the loss of the distal phalange of his right hand.

Upon the foregoing findings are based the following

Conclusions of Law

Section 29 of the Act provides for compensation for an injury where the incapacity for work is total and for so long a period as such incapacity is total, and not to exceed four hundred weeks, payment must be made for such total incapacity.

Upon the termination of such total incapacity in cases of amputations or "loss of use" the disability shall be deemed to continue for the periods specified in Section 31 and no compensation shall be paid in such cases for temporary partial disability or incapacity under Section 30. This latter Section specifically excepting any allowance for temporary or total partial incapacity where the same is provided for under Section 31. In this case the plaintiff was totally incapacitated for work from November 4, 1929, to December 19, 1929, although the amputation immediately followed the accident.

The defendants contend that this period of total incapacity should be dededucted from the period of 17½ weeks allowed under Section 31 for loss of one-half the index finger. The Commission has under an incorrect construction of the Act been following this construction. Schneider, Vol. 2, p. 1023, states: "that ten states provide that specific schedule of benefits are in addition to other compensation, while the other Acts either specifically state, or are construed to make the scheduled benefits exclusive of all other compensation for the specified injuries." The Virginia Act, for example, Section 32 providing for scheduled injuries reads: "In cases included by the following schedule the incapacity in each case shall be deemed to continue for the period specified, and the compensation so paid for such injury shall be specified therein, and shall be in lieu of all other compensation, to wit." Our Act is largely modeled after and closely follows the Virginia Act. Section 31 of our Act is verbatim with that of Virginia, Section 32 quoted, except "Disability" is used instead of "Incapacity" and except for the concluding words as follows: "and shall be in lieu of all other compensation; to wit." This Act is a remedial Statute and in derogation of the common law, and we cannot interpret or read into the Act words not expressly incorporated therein; however, being remedial it must be liberally construed in favor of the injured employee. Had the legislature intended that the allowance for the specific disabilities enumerated in Section 31 to be in lieu of all other compensation, the legislature could and would have so expressed its intent, as was done by stating in Section 30 that no partial disability was compensable where specifically provided for in Section 31. Compensation provided in Section 31 not being in lieu of all other compensation and Section 29 not carrying the exception as is stated in Section 30, the Commissioner must conclude that where the incapacity for work is total the injured employee is entitled to compensation under Section 29 and thereafter in case of amputation or loss of use, compensation for specific disabilities will continue upon termination of total incapacity. Supporting the construction we find that Mr. Schneider, Vol. 2, p. 1085, quoting from a Kansas case states:

"The phrase 'total incapacity for work' as used in Workmen's Compensation Act does not imply an absolute disability to perform any kind of labor, but a person disqualified from performing the usual tasks of a workman in such a way as to enable him to procure and retain employment is ordinarily regarded as 'totally incapacitated.'" Further, Mr. Schneider, Vol. 2, p. 1089, states that "the word 'loss' with reference to a number or function of a member, as used in the Workmen's Compensation Act, means deprivation. The compensation is for the handicap of being without the lost member, and not for impairment of earning power . . ." Quoting from *Franko v. William Schallhorn Co.*, 93 Com. 13, 104 Atl. 485, the court said: "Compensation for the loss of the member will not compensate him for the period of incapacity preceding the loss of the member. The just rule of compensation will give compensation for the period of total incapacity preceding the loss of the member."

Citing *Nitron Co. v. Court Common Pleas*, 84 N.J.L. 243, 11 N.C.A. 434, Mr. Schneider, page 1048, says: "Where an injury to a servant's fingers resulted in temporary total disability, followed by permanent partial disability, an award was made for each under the New Jersey Act and upon certiorari the

Supreme Court affirmed the awards, holding that such a finding was proper, even though they amounted to more than the amount allowed for permanent total disability."

Upon the foregoing it is ordered that there be issued the following

Award

The defendants are ordered to pay to the plaintiff compensation for temporary total disability at the rate of $9.90 per week for a period from November 4 to December 19, 1929, and thereafter pay to the plaintiff compensation for loss of one-half of the right index finger at the rate of $9.90 per week for a period of 17½ weeks.

Each party will pay its own costs.

[Docket No. 156]

OTIS WOOD, Employee, Plaintiff, v. CENTRAL CAROLINA FAIR ASSOCIATION, Employer, and AMERICAN EMPLOYERS INSURANCE COMPANY, Carrier, Defendants

Filed January 23, 1930

SUBROGATION.—Election to make settlement with third party causing disability prior to making claim for compensation bars right to compensation.

Hearing held in Greensboro, N. C., January 6, 1930.

Plaintiff represented by *Messrs. Younce and Younce*, Attorneys, Greensboro, N. C.

Opinion by DORSETT, Commissioner.

Statement of the Case

Otis Wood, the claimant, requested this hearing in order to ascertain whether or not he is entitled to receive compensation for an accidental injury that he sustained on September 5, 1929, while regularly employed by the Central Carolina Fair Association, after having accepted a settlement from the third party responsible for the accident instead of pursuing first his compensation rights.

The defendants through the representative of the insurance carrier, admit that the parties to this proceeding are bound by the provisions of the North Carolina Workmen's Compensation law; that the claimant on September 5, 1929, sustained certain injuries by an accident that arose out of and in the course of his employment; that the average weekly wage earned by the claimant at the time of the accident was $10.38; and that the claimant because of the accident suffered some disability and would be entitled to receive compensation from the defendants if he had not already made a settlement with the third party responsible for the accident; and on the sole ground that a settlement has already been made with the third party, the defendants deny liability.

At the hearing the claimant admitted that he had received from the third party responsible for the accident the sum of $200.00, and had his hospital and doctor's bills paid by way of a settlement, and contends that regardless of this fact he is also entitled to receive from the defendants compensation as provided by the North Carolina Workmen's Compensation Act.

From the evidence the Commissioner makes the following

Findings of Fact

1. The claimant and the defendants are bound by the provisions of the North Carolina Workmen's Compensation Act.

2. On September 5, 1929, the claimant received accidental injury that arose out of and in the course of his employment.

3. The average weekly wage is $10.38.

4. The claimant entered into a settlement with the Dillard Paper Company by which his hospital expenses and doctor's bills were paid, and in addition to this received from the Dillard Paper Company the sum of $200.00.

Conclusions of Law

Section 11 of the North Carolina Workmen's Compensation Law provides that the rights and remedies granted to an employee where he and his employer have accepted the provisions of the Act, shall exclude all other rights and remedies of such employee, etc., . . . provided, however, that when such employee, his personal representative, or other person may have a right to recover damages for such injury, loss of service, or death from any person other than such employer, he may institute an action at law against such third person or persons before an award is made under this Act, and prosecute the same to its final determination; but either the acceptance of an award hereunder, or the procurement of a judgment in an action at law, shall be a bar to proceeding further with the alternate remedy.

In the instant case the claimant admits a settlement with the third party before the acceptance of an award under this Act, and where such is the case this constitutes a complete bar to recovery of compensation. It cannot be denied that an employee injured by a third person has a perfect right under the North Carolina Workmen's Compensation Act to make a settlement with such third person prior to institution of a claim against the employer, and thereby bar any remedy the employee may otherwise previously have had to come before the Industrial Commission and ask for compensation. In the instant case the claimant made his election to proceed against the third party, and thereby lost his right of action before the Industrial Commission, consequently prejudicing the employer's rights to avail itself of the subrogation feature provided by Section 11.

Under the expressed intent of the Statute referred to, no other course is open to the Commission than to direct the case to be dismissed from the docket. Each party will pay its own costs in this proceeding.

[Docket No. 195]

L. W. TISE, Employee, Plaintiff, v. NEWMAN MACHINE COMPANY, Employer, and U. S. FIDELITY AND GUARANTY COMPANY, Carrier, Defendants

Filed January 25, 1930

ASSAULT.—Where evidence fails to show that fight resulted from matters pertaining to claimant's employment, claim will be denied.

Hearing before T. A. WILSON, Commissioner at Greensboro, North Carolina, on January 14, 1930.

F. F. Myrick, Attorney at Law, Greensboro, North Carolina, represented plaintiff.

Defendants represented by *W. E. Smith*, Adjuster for carrier.

Opinion by WILSON, Commissioner.

Summary of Case

The evidence tended to show that plaintiff, L. W. Tise, an employee of the Newman Machine Company, had some time prior to October 11, 1929, discussed with H. Bryson some matters of an intimate and personal nature pertaining to the domestic affairs of said plaintiff. This discussion took place some time during July, 1929. Strained feelings continued to exist between said parties. Bryson is not an employee of the said Newman Machine Company.

October 11, 1929, Bryson entered the plant of Newman Machine Company to talk to one of the officials. Because of convenience said Bryson passed through the workshop when said plaintiff and said Bryson engaged into a fight and plaintiff was severely cut.

The evidence is not entirely clear as to the words uttered by each party at beginning of said fight. The evidence tends to show that it was the culmination of strained relations of the said two parties.

Plaintiff was unable to work for eight weeks. His average weekly wage was $33.00. The medical bills have not been paid by the carrier.

Upon the evidence in this case the Commission makes the following

Findings of Fact

1. That plaintiff and employer have accepted the provisions of this Act, and U. S. Fidelity and Guaranty Company is the carrier.

2. That plaintiff was injured by accident October 11, 1929, while regularly employed by the Newman Machine Company, and in the course of said employment.

3. That said accident *did not* arise out of the employment of said plaintiff.

4. That plaintiff's average weekly wage was $33.00, and that plaintiff was totally disabled for a period of eight weeks immediately following date of accident.

5. That the medical and hospital bills have not been paid by carrier.

Conclusions of Law

The rule is that the claimant must prove not only that the injury occurred in the course of the employment, but also that it arose out of the employment. *Board of Education v. Ind. Com.*, 321 Ill. 23, 151 N. E. 409; *Sparks Milling Company v. Ind. Com.*, 290 Ill. 459, 125 N. E. 260.

In *Ohio Building Vault v. Ind. Board*, 277 Ill. 96, 115 N. E. 149, it was held that an assault on an employee who is engaged in the discharge of his duties arises out of his employment only in those cases where the duties of the employee are such as are likely to cause him to have to deal with persons who in the nature of things are liable to attack him.

In the case before the Commission there is no evidence that plaintiff was required to meet the public and especially H. Bryson, who cut plaintiff. No evidence was submitted to show there was an argument between plaintiff and Bryson about plaintiff's employment by said employer.

The plaintiff's claim is dismissed.

Each party will pay its own cost.

[Docket No. 106]

CLAUDE HERREN, Employee, Plaintiff, v. AMERICAN ENKA CORPORATION, Employer, and THE TRAVELERS INSURANCE COMPANY, Carrier, C. J. KIRK, Defendants

Filed December 26, 1929

NON-INSURER.—Bond required of non-insured employer who has not rejected Act to cover payments of compensation and for necessary operation.

TEMPORARY TOTAL AND SPECIFIC.—Compensation allowed for period of temporary total disability in addition to specific under Section 31 (g).

EYE.—Loss of eye, Section 31 (q) provides for 100 weeks in addition to temporary total disability.

Hearing held before Commissioner WILSON in Asheville, N. C., December 6, 1929.

Plaintiff represented by *W. W. Candler*, Attorney.

Defendants represented by *W. A. Egerton*, Attorney, for American Enka Corporation, and *John W. Cabell* and *A. C. Newsom* for The Travelers Insurance Company.

Opinion by WILSON, Commissioner.

This hearing was held to ascertain who was liable under the Compensation Act for the injury, which arose out of and in the course of the employment of the plaintiff by the defendant C. J. Kirk. Said plaintiff has lost the vision of his right eye as a result of said accident. All medical bills have been paid to date, and ten dollars in compensation.

C. J. Kirk, as employer of plaintiff, had contracted to build some garages for the American Enka Corporation.

The Enka Corporation has retained $1,000.00 of the contractor's money to guarantee the compensation.

Plaintiff's eyeball has not been removed. Part of said thousand dollars is retained to guarantee the cost of operation if it should become necessary to remove same.

Plaintiff was temporarily totally disabled from September 23, 1929, to December 6, 1929, for which he is entitled to compensation in addition to the *one hundred weeks as provided for in Section* 31 (*q*). Said compensation to be paid at the rate of $7.00 per week, payable every four weeks.

The defendant Kirk was an independent contractor.

The thousand dollars shall be placed in the custody of the Clerk of Superior Court of Buncombe County, North Carolina, to be paid out by him in accordance with the foregoing award, and the remainder to be held for one year as a contingency fund in case plaintiff's eyeball has to be removed.

Upon the eighteenth birthday of plaintiff compensation shall be paid without question to plaintiff.

If plaintiff's right eyeball is not removed within twelve months from the date of injury, then the remainder of the amount after payment of compensation then due, plus compensation to be paid under this award, and the total contingency fund shall be returned to C. J. Kirk, unless otherwise ordered by the Commission because of a change in condition.

A fee of ten dollars ($10.00) will be allowed the plaintiff's attorney, said fee to be paid by the Clerk of Court from the compensation due the plaintiff.

[Docket No. 150]

R. M. STARNES, Employee, Plaintiff, v. FLINT MANUFACTURING COMPANY, Employer, and THE TRAVELERS INSURANCE COMPANY, Carrier, Defendants

Filed January 30, 1930

HORSEPLAY.—Where sportive act of fellow workman, independent of and disconnected from performance of any duty resulting injury does not arise out of employment.

Hearing before J. DEWEY DORSETT, Commissioner, January 7, 1930, at Gastonia, N. C.

Opinion by DORSETT, Commissioner.

Statement of the Case

The facts in this case are not in dispute; this action is one brought by the claimant, R. M. Starnes, to recover for personal injuries occurring October 23, 1929, while Starnes was working in the manufacturing plant of the Flint Manufacturing Company. From the evidence it appears that this claimant and a fellow-workman *were playing;* this claimant having put his arm around the waist of his fellow employee by the name of

Nantz, after the said Nantz had "goosed" him, and when Nantz attempted to break the hold that Starnes had upon him, Starnes' finger was broken resulting in his disability.

Only one question is involved in this case, and on this question the defendants are denying liability. Did the injury to Starnes result from an accident that arose out of his employment? The contention of the defendants is that the injury was the result of sportive acts on the part of the claimant, and his co-worker, and hence did not arise out of his employment.

Findings of Fact

1. The parties to this proceeding are bound by the provisions of the North Carolina Workmen's Compensation Act.
2. The accident, while arising in the course of the employment, did not arise out of it.
3. The average weekly wage is $12.35.
4. As a result of the accident the claimant was totally disabled for a period of four weeks, and at the present time is suffering from the loss of use of his broken finger.

Conclusions of Law

This Commissioner is constrained to agree with the contention of the defendants; we do not think the claimant has shown by the evidence that the injury followed as a natural incident of the work and could have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, and therefore is not chargeable to the employment. The plaintiff has failed to trace to his employment the actual connection between the accident and his job.

The general rule recognized by practically all of the courts is that injuries caused by some sportive act, characterized by the courts as "horseplay," of a fellow workman, done independently of and disconnected from the performance of any duties of the employment, does not arise out of the employment within the meaning of the compensation statutes; and consequently, no compensation can be allowed for such injuries.

The defendants contend that this is the correct rule; we think it is, and measure the case by it. An award will issue denying compensation, and the case will go off the docket.

[Docket No. 179]

GLADYS SLUDER, Employee, Plaintiff, v. ASHEVILLE MICA COMPANY, Employer, and GLOBE INDEMNITY COMPANY, Carrier, Defendants

Filed January 30, 1930

TEMPORARY TOTAL AND SPECIFIC.—Section 29 provides for compensation during total disability upon termination specific compensation awarded for loss of fingers.

Hearing before J. DEWEY DORSETT, Commissioner, January 11, 1930, Asheville, N. C.

Opinion by DORSETT, Commissioner.

Statement of the Case

On September 27, 1929, Miss Gladys Sluder, a regular employee of the Asheville Mica Company, sustained an accident that arose out of and in the course of her employment resulting in the loss of more than one phalange of the right index and middle fingers, and the laceration of the right ring finger. The plaintiff was able to return to work on November 22, 1929. This hearing was called for by the plaintiff in order to determine the loss of use, if any, of the lacerated right ring finger. The defendants admit that Miss Sluder was regularly employed by them, and that she sustained an injury by accident that arose out of and in the course of her employment. It is further admitted that the average weekly wage is $14.04. The only evidence offered at the hearing came from medical men, and from this evidence the Commission makes the following

Findings of Fact

1. All the parties are bound by the provisions of the North Carolina Workmen's Compensation Act.

2. The plaintiff on September 27, 1929, sustained an injury by accident arising out of and in the course of her employment, her average weekly wage at the time of the injury being $14.04.

3. The plaintiff was temporarily and totally disabled from September 27, 1929, to November 22, 1929.

4. The plaintiff has suffered the loss of more than one phalange of the index and middle fingers of her right hand.

Under Section 29 of the Workmen's Compensation Act, the claimant is entitled to receive from the defendants compensation at the rate of 60 per cent of her average weekly wage, or $8.42 per week, for the period from September 27, 1929, to November 22, 1929, since during this time she was temporarily and totally disabled.

Under Section 31 of the Act, the claimant is entitled to receive 60 per cent of her average weekly wage for a period of thirty-five weeks, in payment of the loss of the index finger; and 60 per cent of her average weekly wage for a period of thirty weeks for the loss of the second or middle finger. Under the law, the loss of more than one phalange constitutes the loss of the entire finger.

Award

The defendants are directed to pay to the plaintiff, Miss Gladys Sluder, compensation for temporary total disability at the rate of 60 per cent of her average weekly wage, or $8.42 per week, from September 27, 1929, the date of the injury, to November 22, 1929, the date on which she returned to work.

In addition to this, the defendants are directed to pay to the claimant compensation for a period of sixty-five weeks at the rate of $8.42 per week, for the loss of the index and middle fingers of her right hand.

Each side will take care of its own costs in this hearing.

The defendants are also directed to pay any medical bills incurred because of the accident, to the persons entitled to receive the same.

[Docket No. 210]

W. N. MATHESON, Employee, Plaintiff, v. HENDRICK & WADE, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed January 30, 1930

HERNIA.—A real traumatic hernia resulting from force applied directly to abdominal wall either puncturing or tearing wall is only accidental hernia considered, others of either congenital or slow development, a disease rather than accidental injury, unless conclusive proof that hernia was immediately caused by sudden effort or strain.

Hearing before MATT H. ALLEN, Chairman, 9:30 a.m., Office C. S. C., January 23, 1930, at Wadesboro, N. C.

Plaintiff appeared in person.

Defendants represented by *L. E. Herring* of the Maryland Casualty Company.

Opinion by ALLEN, Chairman.

Statement of the Case

This was a claim for compensation for hernia from Anson County.

It was admitted that plaintiff was in the employ of the defendant Hendrick & Wade on the date of the alleged injury, and the Commissioner finds as a fact that the average weekly wages of claimant were $24.00 per week.

It appears from the evidence that plaintiff claims an injury on Thursday, October 31, 1929; that on said date he was engaged with three others in moving a tractor plow in the machine shop, which plow was on wheels, but in the process of moving required some lifting; that on said date plaintiff felt some pain in his side but paid no attention to it, and made no report of it, and continued with his work; that he did not work on the following Friday and Saturday, but reported for duty on Monday, November 4, and continued to work until November 15; that he went to a doctor on November 4 and upon advice bought a truss, and continued to wear the truss until his side became sore and inflamed; that he did not report the injury to any one until November 20; that he never noticed any protrusion until the doctor told him that he had a hernia.

Witnesses Shepherd, Morrison and Dean, who were engaged in the moving of the plow with plaintiff, all testified that there was no strain or unusual effort in the operation, and that plaintiff made no complaint to any one of any injury.

Dr. J. L. Wyatt testified that plaintiff came to his office on November 4 for examination and that he reported that he did not know what caused the hernia unless it was strain.

Dr. C. I. Allen testified that he examined plaintiff on November 20 and plaintiff told him that the hernia came on him while he was lifting cross ties, or something like that. He further testified that in his opinion plantiff might have worked from October 31 to November 14 with hernia, but would have had pain.

Upon consideration of all the evidence, the Commissioner finds that the plaintiff has failed to sustain the burden of definitely proving to the satisfaction of the Commissioner that (1) there was an injury resulting in hernia or rupture, or (2) that the hernia or rupture appeared suddenly, or (3) that it was accompanied by pain, or (4) that the hernia or rupture immediately followed an accident, or (5) that the hernia or rupture did not exist prior to the accident for which compensation is claimed.

This Commission has held that hernia would be considered accidental only where there is real traumatic hernia resulting from the application of force directly to the abdominal wall, either puncturing or tearing the wall, and that all other cases would be considered as either congenital or of slow development, being a disease rather than an accidental injury, unless conclusive proof is offered that the hernia was immediately caused by sudden effort or strain.

It is hard to understand how a hernia can result from an accident without such prostration that the employee is compelled to cease work immediately. At the same time we must recognize that there are wide variations in the individual susceptibility to pain, and that a workman with steady nerves and a strong will might continue to work under conditions which would completely overcome a fellow workman. But even in the latter case it is inconceivable that a person could suddenly develop a hernia from accident with the knowledge of the injury and without communication of the fact to his fellow employees.

It has been estimated that at least three-fourths of all hernia cases develop so slowly and without any local injury or accident that the person knows no cause to which he can attribute it. This group of cases is due to developmental defects and is in the nature of a disease rather than an accident.

In this case it is ordered that an award issue denying compensation.

[Docket No. 206]

C. E. LAWING, Employee, Plaintiff, v. AMERICAN YARN AND PROCESSING COMPANY, Employer, and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Carrier, Defendants

Filed January 31, 1930

ARISING OUT OF AND IN COURSE OF.—Evidence failed to show that "dead rat" placed on seat of car attributed as cause of car backfiring, breaking claimant's arm, was an injury arising out of and in the course of the employment.

Hearing before T. A. WILSON, Commissioner, at Newton, Catawba County, North Carolina, on January 16, 1930.

Plaintiff appeared in person.
Defendants represented by *Mr. D. A. Gardner*, Attorney, Newton, N. C.

Opinion by WILSON, Commissioner.

Summary of Case

This case came on for hearing to determine if the accidental injury to plaintiff on October 3, 1929, arose out of his employment. Plaintiff's right arm, just above the wrist, was broken as the result of his car backfiring when he cranked same just a minute or two after quitting time. Said car was owned by plaintiff and was parked on premises of said employer.

A fellow employee had placed a dead rat, wrapped in waste, in the front of said car. Plaintiff started to throw the waste out when he noticed the rat. He alleges as a result of fright and excitement therefrom that he pulled down the spark lever instead of the gas. The car backfired as a result.

Plaintiff further testified that he placed the rate on the front seat after the first excitement to see some one else jump.

Plaintiff's first testimony was that he placed the rat in the seat before be pulled down the lever; later he said he did not know if it was before or after.

The evidence tends to show by circumstances that plaintiff placed the dead rat on the front seat before he cranked the car.

Upon the evidence in this case, the Commission makes the following

Findings of Fact

1. That plaintiff and employer-defendant have accepted the Compensation Law, and the American Mutual Liability Insurance Company is the carrier.

2. That plaintiff was accidentally injured October 3, 1929, while still on his employer's premises and a few minutes after quitting time as the result of his car backfiring when he cranked the same.

3. That said accidental injury did not arise out of plaintiff's employment.

4. That plaintiff was totally disabled from October 3, 1929, to December 16, 1929, from said accident; and his average weekly wages were $15.00.

5. That the medical and doctor bills have not been paid by the carrier.

Because of lack of sufficient evidence to show that said injury arose out of plaintiff's employment, this case is dismissed.

Each party will pay its own costs.

[Docket No. 249]

HENRY ANNER, Plaintiff, v. A. M. JOHNSON RAYON MILLS, INCORPORATED, Employer, and EMPLOYER'S LIABILITY ASSURANCE CORPORATION, Carrier, Defendants

Filed January 31, 1930

ASSAULT.—Expected that disagreements will arise in connection with the work resulting in blows and fights, injury from such source a risk of employment and arises out of and in course of employment.

Hearing before J. DEWEY DORSETT, Commissioner, at Graham, North Carolina, on January 28, 1930.

Plaintiff represented by *Mr. J. Dolph Long*, Attorney, Burlington, N. C. Defendants represented by *Mr. A. B. Dreher*, Adjuster for the carrier-defendant, of Greensboro, N. C.

Opinion by DORSETT, Commissioner.

Statement of the Case

Henry Anner, the claimant, on December 9, 1929, was regularly employed by the A. M. Johnson Rayon Mills, Inc. He was occupying the high position of superintendent of textiles. A fellow employee by the name of Holt was also an official of the defendant employer, but under the supervision of this claimant was also regularly employed and on December 9 assaulted Anner. One would gather from the evidence at this hearing that this man Holt resented his superior officer giving him instructions. This resentment on the part of Holt had evidently been felt for some time. However, the assault followed directly after the claimant had instructed Holt to fire one of the young lady employees. This led to several very uncomplimentary remarks, including the passing of the "damned liar," and causing or prompting Holt to assault the claimant.

Findings of Fact

1. The claimant, on December 9, 1929, was regularly employed by the defendant company and on that date sustained an injury by accident arising out of and in the course of his employment.

2. At the time of the accident the claimant was earning in excess of thirty dollars per week.

3. After the occurrence of the accident claimant was disabled for a period of six weeks.

4. Claimant has not sustained any serious facial, head, or bodily disfigurement because of this accident.

Conclusions of Law

Where co-employees are working together it is to be expected that disagreements will arise in connection with the work, and that there may be blows and fighting. An injury to an employee from such a source is one of the risks of the employment and is an accidental injury arising out of the employment within the meaning of these terms as used in the compensation act.

Award

The defendants are ordered to pay compensation at the rate of eighteen dollars per week for a period of six weeks. They are further ordered to pay all of the medical and hospital bills to the proper persons and to pay the dentist's bill incurred because of the accident and the costs of this hearing.

So ordered at Raleigh, North Carolina, this, the 31st day of January, 1930.

[Docket No. 234]

D. R. BYNUM, Plaintiff, v. J. F. BRIDGERS, Employer, (No Insurance Carrier), Defendant

Filed January 31, 1930

NON-INSURANCE.—Failure to reject the Act or comply with Section 67 subjects employer to penalty.

Hearing before J. DEWEY DORSETT, Commissioner, at Wilson, North Carolina, January 29, 1930.

Plaintiff appeared in person.

Defendant represented by *Mr. J. R. Griffin*, Attorney at Law, Wilson, N. C.

Opinion by DORSETT, Commissioner.

Statement of the Case

The claimant contends that while regularly employed by J. F. Bridgers on October 29, 1929, he was accidentally injured by stepping on a nail, causing him to loose eleven days from his work and to have to pay certain medical bills. The defendant denies liability, contending that the claimant was not employed by him at the time of the accident; that a few day's prior to this date he had dispensed with the services of the claimant.

From the evidence and from the records in this office the employer, J. F. Bridgers, has not complied with the provision of the North Carolina Compensation Law. There is no doubt of the fact that the employer is subject to the law, having in his employ more than five employees. The employer is conclusively presumed to be operating under the Compensation Law if he does not file with the Commission the proper notices electing to reject the law.

From all the evidence the Commissioner arrives at the following

Findings of Fact

1. The claimant was not employed by the defendant at the time of this accident and is not entitled to receive the benefits of the Compensation Law.

2. The defendant employer, J. F. Bridgers, is operating in violation of the North Carolina Workmen's Compensation Law, having failed to comply with Section 67, which requires that every employer who accepts the provisions of the Act, and this employer has accepted the provisions of the Act in that he has failed to reject the Act, shall insure and keep insured his liability thereunder in some authorized corporation, association, organization, or in any mutual insurance assocation, or shall furnish to the Industrial Commission satisfactory proof of his financial ability to pay direct the compensation in the amount and manner and when due, and is subject to a penalty as provided in Section 68 (b) of the Act. This penalty will be imposed unless this employer either complies with Section 67 or rejects the Act by filing with the Commission proper notices.

Conclusions of Law

The claimant having failed to sustain the burden of proof placed upon him in proving that he was injured while regularly employed by the defendant, the case will have to be dismissed. Each side will pay its own costs.

So ordered at Raleigh, North Carolina, this the 31st day of January, 1930.

[Docket No. 170]

JOHN RICE, Employee, Plaintiff, v. DENNY ROLL AND PANEL COMPANY, Employer, and LONDON GUARANTEE AND ACCIDENT COMPANY, LIMITED, Carrier, Defendants

Filed January 31, 1930

TEMPORARY TOTAL AND SPECIFIC.—Claimant entitled to compensation, Section 29, until termination of disability thereafter to specific compensation for loss of phalanges.

Hearing before J. DEWEY DORSETT, Commissioner, January 6, 1930, at Greensboro, North Carolina.

Opinion by DORSETT, Commissioner.

Statement of the Case

On October 30, 1929, John Rice, the claimant, was regularly employed by the Denny Roll and Panel Company at an average weekly wage of $25.13. On that date the claimant suffered an injury by accident, resulting in some badly lacerated and amputated fingers on his left hand. The defendants raise only two questions: namely, the extent of the disability, and the extent of the amputations.

Dr. Burrus of the Burrus Clinic of High Point, N. C., is the attending physician, and his testimony is that the claimant was temporarily and totally disabled for four weeks, and that because of his injury it was necessary to amputate the distal phalange of the middle finger, and to amputate more than half of the distal phalanges of the ring and little fingers.

From the evidence the Commissioner makes the following

Findings of Fact

1. The parties to this proceeding are bound by the provisions of the North Carolina Workmen's Compensation Act.
2. John Rice, the claimant, on October 30, 1929, suffered an injury by accident that arose out of and in the course of his employment, and because of this accidental injury has lost the distal phalange of the middle, and more than one-half of the distal phalange of the ring and little fingers of his left hand.
3. At the time of the injury, the claimant's average weekly wage was $25.13.

Conclusions of Law

For temporary total disability, the claimant is entitled to receive 60 per cent of his average weekly wage for that period, which in the instant case, if the medical testimony is to be believed, was four weeks. In addition to this, for the specific loss of parts of the fingers as per the schedule of injuries set out in Section 31, the claimant is entitled to receive 60 per cent of his average weekly wage for a period of 15 weeks to cover the loss of one-half the middle finger; for a period of 10 weeks to cover the loss of one-half the ring finger; and for a period of 7½ weeks to cover the loss of one-half the little finger.

Award

The defendants are directed to pay compensation at the rate of 60 per cent of $25.13, or $15.08 per week, for a period of four weeks in payment of temporary total disability suffered by the claimant; and in addition to this, they are directed to pay compensation at the rate of $15.08 per week for a period of 32½ weeks for specific loss under Section 31.

The defendants will pay to the proper persons any hospital and medical bills incurred.

Concerning the cost of this hearing, each side will pay its own.

[Docket No. 160]

LLOYD GREEN, Employee, Plaintiff, v. MANVILLE-JENCKES COMPANY, Employer, and UNION INDEMNITY COMPANY, Carrier, Defendants

Filed January 31, 1930

TEMPORARY TOTAL AND SPECIFIC.—Claimant entitled to compensation under Section 29 until termination of temporary total disability and thereafter to specific compensation for finger and phalanges.

Hearing before J. DEWEY DORSETT, Commissioner, January 7, 1930, at Gastonia, N. C.

Opinion by DORSETT, Commissioner.

Statement of the Case

Lloyd Green was regularly employed by the Manville-Jenckes Company of Gastonia, N. C. On October 28, 1929, he suffered an accident that arose out of and in the course of his employment. At the time of the accident the employee was earning $25.20 per week. As a result of the accident, Lloyd Green, the claimant, has suffered the loss of more than the first phalange of the thumb and index finger, and the loss of the first phalange of the middle finger of his left hand. The medical testimony is to the effect that for a period of eight weeks this claimant was totally disabled.

Findings of Fact

1. The parties, plaintiff and defendant, are bound by the provision of the North Carolina Workmen's Compensation Act.

2. On October 28, 1929, the claimant suffered an accident resulting in the loss of more than one phalange of the thumb and index finger, and the distal phalange of the middle finger of the left hand. Because of the accident the claimant was totally disabled for a period of eight weeks.

3. The accident resulting in total disability and the loss of part of the fingers of the left hand, arose out of and in the course of the claimant's employment.

Conclusions of Law

Under Section 29 of the Workmen's Compensation Act, for temporary total disability, the defendants are required to pay to the claimant compensation at the rate of $15.12 per week for a period of eight weeks. In addition to this, and for specific loss as set out in Section 31, the defendants will pay to the claimant compensation at the rate of $15.12 per week for a period of one hundred and ten weeks to cover the specific loss as per schedule in Section 31.

Award

The defendants are ordered to pay compensation at the rate of 60 per cent of $25.20, or $15.12 per week for a period of 118 weeks, and to pay all the hospital and medical bills incurred to the persons entitled to receive the same.

Concerning the costs of this hearing, each side will pay its own.

[Docket No. 222]

JASPER NEWTON LAWTER, Employee, Plaintiff, v. HENRIEETA MILLS, Employer, and U. S. CASUALTY COMPANY, Carrier, Defendants

Filed January 31, 1930

REPORT.—Failure to report the occurrence of an accident alleged to have happened on July 26 until December 30, 1929, prejudiced employer's rights.

DISEASE.—Heat stroke or prostration resulting from high blood pressure which was just as likely to have occurred during the night while asleep as at the mill not compensable—exposure to no greater degree of heat than fellow employees or public in general exhaustion under circumstances not a risk of employment.

This hearing held before MATT H. ALLEN, Chairman, North Carolina Industrial Commission, Office Clerk Superior Court, 3 p.m., January 24, 1930, in Shelby, N. C.

Plaintiff represented by *Oscar J. Mooneyham*, Attorney, Henrietta, N. C. Defendants represented by *Ralph V. Kidd*, Claim Adjuster, U. S. Casualty Company, Charlotte, N. C.

Opinion by ALLEN, Chairman.

Statement of the Case

This was a claim from Rutherford County, heard by consent of both plaintiff and defendants, at Shelby, North Carolina, Cleveland County, on January 24, 1930.

It was admitted that the plaintiff, at the time of the alleged injury, was in the employ of Henrietta Mills, which owns and operates a mill at Caroleen, N. C.

It appears from the evidence that the plaintiff suffered some kind of an injury in the nature of a heat stroke, on or about the 26th day of July, 1929, and that no report was made of the injury until December 30, 1929.

Plaintiff testified that on the day of the alleged injury he was laying fittings in the weave shop of the Caroleen mill; that at the time he was drawing as wages $10.50 per week; that the weave room was hot and the windows were all closed; that he suddenly became dizzy and unconscious; that he was carried to his home, and his since been incapacitated for work; that he has since suffered from headaches and from aching in the feet and legs; that there were numbers of other people working in the same room who were subjected to the same heat, and that none of the other employees were overcome by the heat; that he never reported his injury to any one until he employed a lawyer.

Drs. Herrill and Wiseman testified that they examined plaintiff in December and found his blood pressure two hundred and ten; that in their opinion his high blood pressure was of long-standing, and that he had a hardening of the arteries; that in his present condition he is apt to have a stroke of paralysis at any time.

There was evidence tending to show that the temperature of the room varied from eighty-four to eighty-six degrees.

Upon the foregoing testimony the Commissioner finds as a fact that plaintiff's condition is not due to an accident which arose out of and in the course of his employment.

A temperature ranging from eighty-four to eighty-six is not unusual during the month of July, and according to all of the evidence, this claimant was not exposed to any greater degree of heat by reason of his employment than were his co-employees and the public in general.

The facts in this case are very similar to the facts in *Grissette v. Knox Furniture Company,* filed November 27, 1929, and reported in the December issue of the Advance Sheets of the Industrial Commission. In this case it was held that where a claimant is not exposed to any greater degree of heat because of his employment than were his fellow employees or the public in general, nor where conditions under which work was being performed would cause undue exhaustion, compensation will be denied.

An injury, to be compensable, must not only arise out of the employment, but it must be received in the course of the employment. It is evident that this claimant was suffering from high blood pressure of long-standing and that this stroke or prostration was just as likely to have occurred during the night while asleep as at the mill while engaged in his work. (Maddens' case, 222 Mass., 494; McNichol's case, 215 Mass., 97; *Bryant v. Fizzell,* 84 N. Y., Law 72).

Section 22 of the Workmen's Compensation Act provides as follows:

"Every injured employee or his representative shall immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a written notice of the accident, and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this Act prior to the giving of such notice, unless it can be shown that the employer, his agent or representative, had knowledge of the accident, or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity, or the fraud or deceit of some third person; but no compensation shall be payable unless such written notice is given within thirty days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice, and the Commission is satisfied that the employer has not been prejudiced thereby."

The Commissioner is not satisfied and cannot find that employer has not been prejudiced by the failure to give notice of this accident. Five months elapsed between the date of the alleged injury and the notice of his accident. If the employer had had notice of the injury it could have had a thorough examination made of the claimant to determine his condition, and it could have had an opportunity to inquire into the previous physical condition of the claimant. The evidence all tends to show that the employer had no knowledge of the alleged injury, and there is no evidence that the claimant was prevented from giving notice by reason of physical or mental incapacity.

It is ordered and adjudged that an award issue denying compensation.

Following cases heard and determined, but are valueless as precedents and not published in advance sheets:

F. M. Robinson v. Robbins Furniture Company and Maryland Casualty Company, Docket No. 74.

Homer Hart v. H. W. Porter & Company and Maryland Casualty Company, Docket No. 99.

C. W. Williams v. Blue Ridge Machinery Company and Alliance Casualty Company, Docket No. 60.

R. S. Brown v. Imperial Tobacco Company and Travelers Insurance Company, Docket No. 122.

Jim Lackey v. Pigeon River Tunnel Company and Travelers Insurance Company, Docket No. 167.

Max R. Kelly v. Select Tire Company and Maryland Casualty Company, Docket No. 72.

Ed Dunn v. E. F. Calhoun and Maryland Casualty Company, Docket No. 116.

Robert Cheek v. J. R. Bryan & Company and Commercial Casualty Company, Docket No. 217.

John Allen v. Griffin Implement Company and Constitutional Indemnity Company, Docket No. 181.

Geo. F. Younts v. Board of Education, Davidson County and Aetna Life Insurance Company, Docket No. 168.

George Morgan v. Harris Clay Company, Docket No. 157.

Chester D. Harman v. Carolina Hotel and Southern Surety Company, Docket No. 220.

Grover McGreary v. Manville Jenckes Company and Union Indemnity Company, Docket No. 200.

Albert Jordan v. Phillips Carey Company and London Guarantee Company, Docket 198.

J. R. Pope v. Burlington Mills and American Mutual Liability Insurance Company, Docket No. 215.

R. D. McCoy v. D. Pender Grocery Company and Maryland Casualty Company, Docket No. 175.

Sam P. Batchelor v. Shepherd Furniture Company and Globe Indemnity Company, Docket No. 243.

J. A. Chambers v. Sellers Manufacturing Company and Columbia Casualty Company, Docket No. 241.

John Maucini v. E. H. Clement & Company and United States Casualty Company, Docket No. 232.

W. L. Fowler v. Progressive Painting and Decorating Company and Standard Accident Insurance Company, Docket No. 30.

Robert Mills v. Cleggs Bakery and American Mutual Liability Insurance Company, Docket No. 182.

Bone Black v. Z. B. Weathers & Sons and United States Casualty Company, Docket No. 151.

W. W. Johnson v. J. T. Platt and Bankers Indemnity Company, Docket No. 205.

Merritt Watts v. Henrietta Mills and United States Casualty Company, Docket No. 166.

Vol. I Pages 255 to 332 No. 6

ADVANCE SHEETS

OF

OPINIONS IN CASES

HEARD AND DETERMINED
BY THE

NORTH CAROLINA INDUSTRIAL COMMISSION

RALEIGH

MARCH, 1930

OPINIONS TO MARCH 1

SUBSCRIPTION PRICE $5.00 PER YEAR
IN ADVANCE

PUBLISHED MONTHLY FOR THE COMMISSION
BY
EDWARDS & BROUGHTON COMPANY
RALEIGH, N. C.

Entered as second-class matter January 25, 1930,
at the post-office at Raleigh, North Carolina,
under the Act of March 3, 1879.

INDEX

Case *Page*

J. S. Bergman *v.* Hedrick & Wade et al. 255
D. F. Bishop *v.* Robinson Brothers et al. 256
Charles Warren et al. *v.* Parsons Tanning Co. et al. 258
Isom Blackwell *v.* Chipman-Burroughs Mills et al. 261
J. H. Cranfield *v.* Gordon Mills et al. 262
Lloyd V. Parsons *v.* Boards of Education et al. 264
K. W. Pfaff *v.* Forsyth County et al. 270
Paul McLean *v.* Michael & Bivens et al. 275
L. C. Nance *v.* Tomlinson Chair Co. et al. 276
George H. Reeves et al. *v.* Parker-Graham-Sexton et al. 277
Harold G. Freeman et al. *v.* B. & N. Motor Co. et al. 283
Charles Lominac *v.* American Forest Products Co. et al. 288
W. H. Aycock et al. *v.* George H. Cooper 290
J. J. Brakefield et al. *v.* H. D. Horton et al. 293
Marion Bovis *v.* Manville-Jenckes Co. et al. 296
Winfred Bradley *v.* Ozark Mills et al. 298
Charlie Smith et al. *v.* Green Street Drug Co. et al. 302
Seth Morehead et al. *v.* Southern Bell Telephone Co. et al. 305
Walter F. Griffin et al. *v.* McLellan Stores et al. 308
R. F. Hepler et al. *v.* Forsyth Furnitures Lines et al. 309
W. C. Stegall *v.* Wade Manufacturing Co. et al. 313
Graham Piercy *v.* Henrietta Mills et al. 314
James Smith *v.* Neuse Veneer and Box Co. et al. 317
D. J. Sisk *v.* Ora Mill Co. et al. 320
Harold G. Freeman et al. *v.* B. & N. Motor Co. et al. 324

NORTH CAROLINA INDUSTRIAL COMMISSION

MATT H. ALLEN, CHAIRMAN
J. DEWEY DORSETT
T. A. WILSON
COMMISSIONERS

E. W. PRICE, SECRETARY

ELEVENTH FLOOR RALEIGH BANK & TRUST BUILDING
RALEIGH, N. C.

[Docket No. 245]

J. S. BERGMAN, Jr., Employee, Plaintiff, v. HEDRICK & WADE, Inc., Employer, and MARYLAND CASUALTY CO., Carrier, Defendants

Filed February 1, 1930

Traveling Salesman.—When called into conference by employer in distant town, later after having dinner with a friend and upon the return trip home, happens to an accident, about eight o'clock, p.m., resulting injuries arise out of and in the course of the employment.

Intoxication.—Burden upon defendants to prove accident resulted from intoxication.

Hearing held before Matt H. Allen, Chairman, at office C. S. C., Wadesboro, N. C., January 23, 1930.

Plaintiff appeared in person.

Defendants represented by *L. E. Herring*, Adjuster Maryland Casualty Company.

Opinion by Allen, Chairman.

Statement of the Case

This is a claim from Anson County for compensation on account of injuries received in an automobile accident.

It appears from the evidence that on the 18th day of November, 1929, the claimant, by engagement, met his employer in the town of Albemarle for a business conference, and that they remained in conference until late in the afternoon; that after the conference claimant accepted an invitation to dine with a friend, Mr. Devant; that after dinner, and about eight o'clock in the evening, he started on his return trip to Wadesboro in the automobile of the employer; that between eight and nine o'clock, and within a few miles of the town of Norwood, he lost control of the automobile and was thrown against a culvert and over an embankment, thereby sustaining injuries to his right eye, his nose, and right leg, from which he was incapacitated until December 4, a period of seventeen days; that his wages at the time of the injury were $150.00 per month; that he was employed as a traveling salesman, and traveled in the automobile in which he was injured, and which was furnished by the employer.

The defendant denied liability under Section No. 13 of the Act, which provides, among other things, that no compensation shall be payable if the injury or death was occasioned by intoxication of the employee.

The only evidence upon this question was that of the claimant himself in response to a question by the Commissioner as to how the accident occurred. He testified that about dark, and after the conference, he took one drink of whiskey; that about two hours later, and just before supper, at the home of Mr. Devant, he took a second drink of whiskey; that after supper Mr. Devant drove him down town to the place where his automobile was parked, and that he immediately left Albemarle for Wadesboro. There is no other suggestion of intoxication, and from this evidence the defendant contends that the Commissioner should find that this claimant was drunk. If the defendants rely upon Section No. 13, the burden is upon them to establish the intoxication of the plaintiff by the greater weight of the evidence, and having failed to do so, the Commissioner finds as a fact that the injuries to plaintiff resulted from an accident which arose out of and in the course of his employment, and that at the time of the accident the claimant was not intoxicated.

Upon the close of the testimony the Commissioner directed the claimant to report to Dr. Sloan of Charlotte, N. C., for examination as to the condition of his right eye. The examination of Dr. Sloan revealed a muscalar imbalance which will require attention at intervals for several months.

Upon the foregoing evidence it is Ordered and adjudged that an Award issue providing for payment of compensation to the plaintiff for a period of ten days at the rate of sixty per cent of his average weekly wages, amounting to $25.26, and that the defendants pay all medical and hospital bills, including treatment necessary for the next several months, and until there has been a recovery from the muscular imbalance.

[Docket No. 191]

D. F. BISHOP, Employee, Plaintiff, v. ROBINSON BROTHERS, Inc., Employer, and UNITED STATES FIDELITY AND GUARANTY CO., Carrier, Defendants

Filed February 1, 1930

Loss of Vision.—Fifty per cent loss of vision in each eye entitles claimant to compensation for one hundred weeks.

Hearing before J. Dewey Dorsett, Commissioner, at Asheville, N. C., January 11, 1930.

Opinion by Dorsett, Commissioner.

Statement of the Case

The facts in this case are not in dispute. The plaintiff was a regular employee of Robinson Brothers, Inc. He was injured on July 19, 1929, the injury occurring in this manner—as reported by his employer: "He laid up wall under contrete ream and went around to the other side to point up, and looked up, and fresh mortar fell filling both eyes."

The file in this case contains an agreement dated July 27, 1929, for the payment of compensation for temporary total disability, approved by an award of the Commission under date of September 12, 1929. This agreement represents the true facts as they existed at the time of the injury.

The plaintiff is a highly skilled workman, and at the time of his injury was earning far in excess of $30.00 per week. Because of this injury both of the plaintiff's eyes have been seriously impaired. The medical testimony is to the effect that both eyes are permanently impaired to the extent of at least 50 per cent of the vision of each. The evidence of this plaintiff and that of Dr. McColl is that the plaintiff has been totally disabled for a period of at least eighteen weeks, and that during this period the plaintiff was unable to do any work at all.

The purpose of this hearing is to ascertain when temporary total disability terminated, and to establish the extent of the permanent disabiliiy or the extent of the loss of vision suffered because of the accident.

From all the evidence the Commissioner makes the following

Findings of Fact

1. The parties of this proceeding are bound by the provisions of the North Carolina Workmen's Compensation Act of 1929.
2. The accident resulting in the injury of the plaintiff arose out of and in the course of his employment. At the time of the accident, the plaintiff was earning in excess of $30.00 per week.
3. The plaintiff was totally disabled for a period of eighteen weeks.
4. The plaintiff has lost 50 per cent of the vision of each eye.

Conclusions of Law

For temporary total disability, the plaintiff is entitled to receive $18.00 a week for a period of eighteen weeks; and in addition to this, as set out in Section 31 of the Act, the plaintiff is entitled to receive $18.00 a week for a period of fifty weeks for the loss of vision of one eye, and $18.00 a week for a period of fifty weeks for the loss of vision of the other eye; or, for the specific loss, the plaintiff is entitled to receive $18.00 a week for a period of one hundred weeks.

Under Section 25, the plaintiff is entitled to receive all of the medical, surgical, and hospital or other treatment, as well as medical and surgical supplies as may reasonably be required to effect a cure or give relief.

Award

The defendants are ordered to pay compensation for temporary total disability at the rate of $18.00 per week for a period of eighteen weeks; and in addition to this, the defendants are to pay to the plaintiff compensation for one hundred weeks at the rate of $18.00 a week, for the specific loss of vision in both eyes, under Section 31. The defendants will also pay all the medical, surgical, hospital, and other treatments necessary in this case, and will pay the costs of this hearing.

The plaintiff has requested from this Commission a lump sum settlement. The insurance carrier does not object to such a settlement. After taking into consideration all of the circumstances, the Commission approves a lump sum settlement, and it is so ordered.

[Docket No. 79]

CHARLES WARREN, Employee, Deceased, MRS. BETTY G. WARREN, Widow, Plaintiff, v. PARSONS TANNING COMPANY, Employer, and WESTERN CASUALTY COMPANY, Carrier, Defendants

Filed February 1, 1930

RECEIPTS FOR PAYMENTS DUE MINORS.—Natural guardian has right to receive and receipt for weekly payments although aggregate amounts of previous weekly payments made exceed $300.00, for that right to such payments has been discharged by payment, leaving amount to which minor entitled only one weekly payment unpaid.

DEPENDENTS.—Persons conclusively presumed dependent entitled to 60 per cent of average weekly wage for 350 weeks subject to maximums and minimums prescribed.

Hearing held before J. DEWEY DORSETT, Commissioner, at Sylva, N. C., January 11, 1930.

Plaintiff represented by *Messrs. Sutton & Stillwell*, Attorneys, Sylva, N. C.

Defendants represented by *Alley & Alley*, Attorneys, Waynesville, N. C.

Opinion by DORSETT, Commissioner.

Statement of the Case

Charles Warren, on October 14, 1929, while regularly employed by the Parsons Tanning Company, fell into a vat of hot tanning extract and was severely scalded. As a result of the injuries he sustained, he died on October 15, 1929. The facts in this case are not in dispute. The employer is not denying liability, having admitted, and those admissions are part of the record, that Charles Warren, the deceased, was regularly employed at an average weekly wage of $14.66; that on October 14, 1929, he suffered an injury by accidentally falling into a vat of hot tanning extract; and that the said injury arose out of and in the course of his employment. The dependents are Betty G. Warren, the wife, and James Wesley Warren, a child who is under the age of two years.

The purpose of this hearing is to determine the amount of compensation the dependents are entitled to receive. The defendants offered a settlement to the widow of the deceased, but she declined to sign the agreement and, in the words of her attorney, returned the same on account of the smallness of the sum offered.

From all the evidence, the Commissioner makes the following

Findings of Fact

1. The parties, plaintiff and defendants, are bound by the provisions of the North Carolina Workmen's Compensation Law, neither having filed with the Commission their election to reject the said law.

2. The deceased, Charles Warren, while regularly employed by the defendant employer was fatally injured by falling into a vat of hot tanning extract, said injury resulting in his death a few hours after the accident.

3. The average weekly wage was $14,66.

4. The dependents are the widow, Mrs. Betty G. Warren, and a small child, James Wesley Warren.

Conclusions of Law

Under the North Carolina Workmen's Compensation Law, the widow and child in the instant case are conclusively presumed to be wholly dependent upon the earnings of the deceased, for support, at the time of the fatal accident. This Commission in a number of cases already disposed of has consistently said that where an employee dies leaving dependents wholly dependent upon him for support, that compensation is to be paid by the terms specified in Section 38 of the Compensation Act, providing payment be made to the dependents on a weekly basis at the rate of sixty per cent of the average weekly wage, but not more than $18.00, nor less than $7.00, for a period of three hundred and fifty weeks after the date of the injury, and burial expenses not to exceed $200.00.

Under the provisions of that Section, the Commissioner makes the following

Award

The defendants are ordered to pay compensation at the rate of $8.80 per week, to the dependents, for a period of three hundred and fifty weeks. The defendants are further directed to pay to the proper persons funeral expenses not to exceed $200.00, and to pay any hospital, doctor, or medical bills incurred by the accident.

It is further adjudged that the receipt of Mrs. Betty G. Warren shall acquit the employer, and be a full and complete discharge of all claims or demands of James Wesley Warren. We think this is proper under the Sections that deal with the receipts for payments. Section 47 (a) says that the receipt of a widow or widower will acquit the employer when payments are for the benefit of either their use or the use of the child or children.

Section 18½ (a) provides that payments shall be paid in installments weekly, unless otherwise specifically provided for by order of the Industrial Commission.

Sections 29, 30, 31, and 38, provide for maximum weekly payments of $18.00.

The two sections quoted above limit the right of payment of compensation to weekly payments or installments, except where ordered by the Commission, and a maximum amount of $18.00 for each installment that may be due . . . a minor under 18 years of age, therefore, is limited in right to a periodic weekly installment of not more than $18.00, which amount if paid ceased to be a sum to which such minor would be entitled. The right to these weekly installments not in excess of $18.00 does not accrue until the due date of each such installment.

Section 47 (a), relating to the receipt by the natural guardian, is restricted by Section 47 (b), where a minor under eighteen years of age shall be entitled to receive a sum or sums amounting in the aggregate to not more than $300.00; receipt of natural guardian releases employer. (Section 47 (c) Whenever any payment of over $300.00 is made to a minor under eighteen years of age, it shall be made to some person or corporation appointed by the Superior Court as provided in that Section.

Construing the two Sections just above in *pari materia*, "entitle" is defined as being a right or title; "entitled to property" is a right to it; "aggregate" is defined to bring in, collect, or accumulate; "payment" is defined as discharge of a right.

Upon the weekly installment basis, a right accrues weekly to not more than $18.00 each week, which right is discharged by the payment of the $18.00, so that even though the $18.00 weekly payments reached the total of $300.00 the right to the succeeding weekly installment of $18.00 is the only amount to which a right remains, which if unpaid until the succeeding weekly installment of $18.00 becomes due gives a right to payment of only $36.00, instead of a right to the total sum paid and unpaid of $336.00, the right to the $300.00 having been discharged by payment.

If the payments have all been made until the total payments made amount to $300.00, the sum or sums to which the minor had the right to demand, or would be entitled to, had not accumulated or amounted to in the aggregate of $300.00, as the right had expired upon the payments.

It follows, we think, that if under Section 47 (b) the natural guardian can continue to receipt for payments of weekly installments after the total previous payments have amounted to $300.00, there is nothing in Section 47 (c) prohibiting such receipt being given. Section 47 (c) applies to any payment of over $300.00 to a minor.

Payment is the discharge of a liability by delivery of money—the Section only uses the singular "payment," and since the weekly payment is the maximum of $18.00, that amount is obviously less than a payment of $300.00.

Clearly, the portions of Section 47 (b) and (c) apply only where for reasons the weekly payments have accumulated and remain unpaid until the aggregate of such payments are $300.00, or where the weekly payments have been commuted to a lump sum which will amount to $300.00 or more.

This Commissioner believes that the above construction is in line with the spirit of the Compensation Act. The dependents are entitled to receive the benefits of this Act with as little cost as possible, and if it is necessary to go to the expense in cases like the instant one of appointing a guardian or trustee and allowing the said guardian or trustee the commissions they are entitled to receive, then we believe that the dependents are having to suffer the payment of cost that is unnecessary. Our Supreme Court may say that it is necessary in the instant case that a guardian or trustee be appointed, but this Commission refuses to say this.

The above construction will certainly be a saving of unnecessary and we think, needless expense.

Concerning the costs of this case, each side will pay its own.

[Docket No. 73]

ISOM BLACKWELL, Employee, Plaintiff, v. CHIPMAN-BURROWS HOSIERY MILLS CO., Employer, and MARYLAND CASUALTY CO., Carrier, Defendants

Filed January 31, 1930

FAINTING.—When fainting due to excessive heat and not "fits," and person in going to window for fresh air and is burned, resulting injury compensable.

This case was set for hearing at Hendersonville, N. C., on November 9, 1929. The plaintiff was neither present nor represented by counsel; thereupon, MATT H. ALLEN, Chairman made an investigation of the matter. The hearing was reset for a later date, and the case was heard before J. DEWEY DORSETT, Commissioner on January 9, 1930, at which time the plaintiff's testimony was taken.

The plaintiff was represented by *Mr. J. S. Massenburg*, Attorney of Tryon, N. C.

The defendants were represented by *Mr. M. L. Page* and *Mr. L. B. Carpenter* of the Maryland Casualty Co., Asheville, N. C.

Opinion by DORSETT, Commissioner.

Statement of the Case

Isom Blackwell, the plaintiff, sustained an injury on September 30, 1929, which he contends was an accidental injury, meeting the requirements of Section 2 (f) of the Compensation Act, and that, therefore, he is entitled to receive from his employer compensation for six weeks, the period of temporary total disability, and the payment of his medical and doctor's bills.

The defendants deny liability; they contend that the claimant was subject to fits; that he had a fit on the date of the injury; and that because of this helpless condition he sustained the burn that resulted in his total disability for six weeks.

This plaintiff is an old gentleman, and he testifies that he does not recall ever having had fits, but says that he does remember that his father told him that when he (the plaintiff) was a small child he did have something like fits occasionally. He further says that for a number of years his health has been very good for a man of his age. He denies having a fit on the date of the injury, but says that he was hot and did have a fainting spell and went to the window of the mill for fresh air, and in fainting he fell against the steam pipe, causing his injury. The attending physician testifies that the burn was so bad on the knee of the plaintiff that he was disabled for a period of six weeks.

The insurance company admits that the average weekly wage at the time of the accident was small enough to make the $7.00 weekly payment apply in this case if the case is a compensable one.

Findings of Fact

1. The parties, plaintiff and defendants, are bound by the provisions of the North Carolina law.

2. The plaintiff at the time of the accident was regularly employed by the defendant-employer at a wage of $1.25 per day, for a five and one-half day week.

3. The accident resulting in temporary total disability for a period of six weeks arose out of and in the course of the plaintiff's employment.

Conclusions of Law

The burden of proof is upon the plaintiff in every case to prove by the greater weight of the evidence that he was, first, accidentally injured; and second, that the accident arose out of and in the course of the employment.

In the instant case we believe the plaintiff has sustained the proof, and compensation must be allowed.

This plaintiff was employed at a wage of $1.25 per day, for a five and one-half day week, and is therefore entitled to receive the minimum weekly payment of $7.00 as provided by the Act.

Award

The defendants are ordered to pay to the plaintiff compensation at the rate of $7.00 per week, for a period of six weeks, and to pay all the medical and doctor's bills incurred; and to pay Dr. M. C. Palmer the sum of $10.00, and mileage at the rate of 8 cents per mile for his attendance at this hearing, as a witness for the plaintiff; and to pay the costs of this hearing.

[Docket No. 186]

J. H. CRANFIELD, Plaintiff, v. GORDON MILLS, Inc., Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed February 5, 1930

FACIAL DISFIGUREMENT.—Claimant did not sustain serious facial disfigurement by losing two teeth which were replaced by employer.

DENTAL TREATMENT.—Cost of replacing and treating for two teeth awarded against employer.

Hearing before T. A. WILSON, Commissioner, at Wilkesboro, N. C., at 11:00 a.m., on January 17, 1930.

Plaintiff appeared in person. Counsel for plaintiff later came into Court; *Mr. C. P. Barringer*, Attorney at Law, Salisbury, N. C.

Defendants represented by *Mr. L. F. Brinkley,* Adjuster for the Maryland Casualty Company of Charlotte, N. C.

Opinion by WILSON, Commissioner.

This case came on for hearing to determine (1) if plaintiff had permanent facial disfigurement; (2) if there is a permanent injury as the result of several teeth being removed because of accident; and (3) if plaintiff was discharged because of his efforts to collect compensation.

It was admitted that plaintiff's injuries were accidental, and that they arose out of and in the course of his employment by said defendant employer October 24, 1929.

The evidence tended to show that plaintiff's jaw bone was crushed above two teeth; that said two teeth were removed; that another had been broken; that plaintiff lost six days as a result of said injury; that plaintiff received full and ample medical attention; that his teeth had been replaced by a bridge and two crowned; that there is some pain as a result of said injuries when plaintiff eats; that there is no facial disfigurement; that plaintiff was not discharged as a result of said application for compensation, but as a result of often being late to his work, and other matters pertaining directly to his job.

Plaintiff also complained of one tooth, on the lower right side, leaving its foundation and interfering with the closing of his mouth. Dr. Casey, who treated plaintiff, said he did not think condition of said tooth was the result of said accident, but the result of pyorrhea.

Upon the evidence in this case, the Commission makes the following

Findings of Fact

1. That all parties have accepted the compensation law, and that Maryland Casualty Company is the carrier.

2. That plaintiff sustained an injury to his mouth by accident, which arose out of and in the course of his employment; that as a result of said injury, the two upper front teeth were removed, another was broken; and that it was necessary to replace same with a bridge; that accident occurred October 24, 1929.

3. That plaintiff has no permanent facial disfigurement.

4. That there is no permanent injury that will interfere with plaintiff's earning power.

5. That plaintiff was not discharged as a result of said accident.

6. That plaintiff has received ample medical and dental treatment to date: that said plaintiff is entitled to further dental treatment if it is necessary to relieve pain, and if the pain can be relieved by additional treatment.

7. That the condition of tooth on the lower right jaw is not the result of said accident.

8. The plaintiff was totally disabled less than seven days as a result of said accident.

Award

Plaintiff is awarded full and ample medical and dental treatment, under Section 25, to relieve any pain that is the result of said injury; said medical bills are subject to the approval of the Commission.

[Docket No. 70]

LLOYD V. PARSONS, Deceased, Plaintiff, v. BOARDS OF EDUCATION, Ashe and Watauga Counties, Elkland Consolidated School District, and U. S. F. & G. COMPANY, Carrier, Defendants

Filed January 23, 1930

SCHOOL DISTRICT.—Employer of a joint local school district is as such an employee of the County school boards of the two Counties jointly operating and owning the school.

COUNTY BOARDS OF EDUCATION.—It nor its employees can reject the act, but are bound by its terms.

JOINT EMPLOYERS.—Award against joint employers for payments of Compensation, 50 per cent each.

Hearing before T. A. WILSON, Commissioner, at Jefferson, N. C., November 17, 1929.

Plaintiff represented by *W. R. Baugess* of Jefferson, N. C.

Ashe County Board of Education, defendant, represented by *T. C. Bowie*, Attorney of Jefferson, N. C. Watauga County Board of Education, defendant, represented by *J. E. Holshouser*, Attorney of Boone, N. C. Defendant carrier represented by *F. N. Tongue*, adjuster for the U. S. F. & G. Company of Asheville, N. C.

Opinion by WILSON, Commissioner.

Summary of Case

The above styled case was heard to ascertain if the Board of Education of Ashe County is liable for compensation to the dependents of Lloyd Parsons, deceased, who fell off the Elkland Consolidated Schoolhouse (also known as Todd), while repairing the roof, or as to whether the Board of Education of Watauga County is responsible, or if they are jointly liable. At the hearing the question was raised as to whether Parsons was legally hired. Also, the County Attorney of Ashe contends that the School Board of Ashe County has "not elected to come under the so-called Compensation Law of North Carolina."

It is admitted that Lloyd Parsons fell off the Elkland Consolidated Schoolhouse while repairing the roof on September 3, 1929, and that his wages were $12.00 per week.

The Elkland School is located in Old Fields Township, Ashe County, North Carolina. The land for the Elkland School site was conveyed by deed July 8, 1919, by F. M. Ray and wife, Sallie; Joe Barlow and wife, Lola, of Ashe County, to C. Green, Dr. Gambill and H. C. Tucker, Board of Education of Ashe County and J. W. Farthing, W. H. Howell and T. P. Adams, Board of Education of Watauga County, jointly, State of North Carolina, said deed being registered 11 o'clock a.m., August 12, 1929, at Jefferson, Ashe County, N. C.

The first building erected, 1919, was paid for, one-third by Ashe County, one-third by Watauga County, and one-third donated by subscription. The addition built in 1923 was paid for jointly by Ashe and Watauga counties, each County paying one-half. There was no special tax or bonds issued for building purposes.

John Cox, Chairman of the School Committee of the Elkland Consolidated School District, testified that part of the tar paper roof "blew off along in the spring or summer; it like to have blown the roof off, and did blow some patches off."

Ron Davis, teacher at the Elkland School, testified that "the building leaked in a number of places where the roof was not blown off, but of course it leaked more where it was blown off." He further said that "it was practically necessary that something be done without twelve months delay." He said it was not "practical to have school in the building as it was."

John Cox testified that he hired Lloyd Parsons to repair the roof; that Parsons expected the money to come from the School Board, and that nothing was said about a box supper. In fact, the box supper was not held until after the accident.

Cox testified he and Mr. Davis represented Ashe County on the Elkland School Board. Mr. Miller and Mr. Holman represented Watauga. The law provides for three members from Ashe County, but most of the time there were two from each County.

Smith Hagaman, Superintendent of Public Instruction for Watauga County, testified that "the Board of Education in Watauga County decided that they had no right under the law to furnish any moneys for repairs on the building . . . and . . . they have been paying something for rent to take the place of the incidental fund." See Sections 5472, 5473 and 5482 C. S.

Therefore, Mr. Cox said, he only went to the Ashe County Superintendent of Schools and Ashe County School Board.

In answer to question as to what the Ashe County Board told him, Mr. Cox said, "they told me they want it (the roof) fixed as good and as cheap as it could be fixed; I don't remember how he told me it was to be paid for; they said they didn't have any funds to pay for it." He said he did not go to the Watauga Board. Mr. Cox said he didn't know whether it would be paid for out of the local fund or by the School Board.

Mr. Cox said Mr. Plummer, County Superintendent of Public Instruction, and Mr. Duncan, Chairman of the Ashe County School Board, told him to make the repairs.

In regard to making repairs on the school building, J. W. Duncan, Chairman Ashe County School Board, testified as follows:

Q. The board usually elects to give the authority, doesn't it?
A. We can do that, or we can let the committee repair the building, and they have the repairs done.

Q. And it is authorized when they send the bill in?
A. Yes sir.

Q. Do you recall Mr. Cox coming to you and asking for permission to repair the building?
A. He might have mentioned it; I wouldn't say he didn't, but I don't recall.

Q. Do you recall stating to him that you didn't have the money, but to go ahead and repair it?
A. I don't remember the conversation; I didn't take no note of it.

Fred Howell, for eight or nine years secretary and treasurer of the school committee, but not connected with same since last April, testified:

"Mr. Cox and myself usually employed all the work done on the building—putting in window lights, putting in stoves and repairing the roof, and putting in a water line—we bought the pipe and put in a water line—it was something like four hundred yards. There were several different things and I always made out an itemized account of what we spent; Mr. Cox and I would usually pay it and not wait to collect the money; in fact we couldn't get it when they would do the work—we couldn't get it until after the taxes were paid and we had to wait, and make out an itemized account of all the time and what it was for; then we would divide it by two and send each County a copy of the account."

The evidence tended to show that it was not uncommon to have minor work without authorization of the County School Board and the bills paid if considered reasonable and fair.

Parsons would have received approximately twenty dollars for repairing the roof, his widow said.

The wages were $2.00 per day for six days per week.

Lloyd Parsons and his wife had four children, Virginia Ruth, age 9; Ruby, 7; Adelephine, 4; R. F., 2, all are living. Mrs. Parsons had two children, Willie and Edward, before her marriage to Lloyd Parsons. She testified that Lloyd parsons had supported said children prior to his death. Willie and Edward Parsons are less than eighteen years of age.

The medical, hospital bills and funeral bills have not been paid by defendants.

Upon the evidence in this case, the Commission makes the following

Findings of Fact

1. That Lloyd Parsons had not rejected the Compensation Act.

2. That Watauga County School Board had insured its risk with the United States Fidelity and Guaranty Company.

3. That Ashe County School Board had neither provided insurance nor served notice of qualifying as a self-insurer, and, in fact, upon the recommendation of its County Attorney decided to ignore the Compensation Act.

4. That the Elkland Consolidated School is jointly owned by Watauga and Ashe County Boards of Education.

5. That Watauga and Ashe County School Boards are jointly liable to the dependents of Lloyd Parsons, deceased, to the extent of fifty (50%) per cent each.

6. That Lloyd Parsons was accidentally injured September 3, 1929, by falling from the Elkland Consolidated School Building, and died a few days later; that said injury arose out of and in the course of his employment.

7. That Lloyd Parsons was an employee of the local Elkland Consolidated School Board and as such was an employee of the Watauga and Ashe County School Boards, jointly.

8. That John Cox was Chairman of Elkland Consolidated School Committee; that Cox was acting as the agent of Ashe County School Board when he hired said Lloyd Parsons to repair the roof of said school house; that similar acts of said Cox have been recognized by the Ashe County School Board and the expense incurred paid; that said Lloyd Parsons accepted Cox as the agent of the County School Board; that said repair work was an emergency job.

9. That Ashe County School Board and its employees are subject to the provisions of the North Carolina Workmen's Compensation Act.

10. That deceased was making $12.00 per week.

11. That neither the medical bills nor funeral expenses have been paid.

12. That Ashe County School Board cannot reject the Compensation Act.

13. That the widow, Mrs. Lloyd Parsons, and four minor children, Virginia Ruth, Ruby, Adelephine, R. F., were wholly dependent, and that Willie and Edward, minor children of Mrs. Parsons prior to marriage, were also wholly dependent upon the deceased.

Conclusions of Law

Watauga County Board of Education through its insurance carrier admitted liability to the extent of one-half.

Therefore, the Commission has to consider only the denials of liability by the Ashe County Board of Education as stated by its attorney, T. C. Bowie, to wit:

"1. That the Board of Education of Ashe County have not elected to come under the so-called Compensation Law of North Carolina, and

"2. For the reason that they had no contract with the deceased, had never employed the deceased, and never authorized any other person to employ the deceased."

Section 8 of the Compensation Act reads:

"Neither the State nor any municipal corporation within the State, nor any political subdivision thereof, nor any employee of the State or of any such corporation or subdivision shall have the right to reject the provisions of this act relative to payment and acceptance of compensation and the provisions of Sections 5, 6, 15, 16 and 17 shall not apply to them."

Therefore, under Section 8 neither Ashe County nor its School Board have an election. The General Assembly made the Compensation Law mandatory.

In regards Municipal Corporation, Appendix 1, Article VII, Section 14 of the North Carolina Constitution, says: "The General Assembly shall have full power by statute to modify, change, or abrogate any and all of the provisions of this article, and substitute others in their place, except sections seven, nine, and thirteen," which relate to debt or loan, taxes and debts in aid of rebellion.

The Supreme Court of North Carolina is quite clear as to the jurisdiction of the General Assembly over municipal corporations and governmental agencies. In *Ellis v. Greene*, 191 N. C., 761, Justice Clarkson, speaking to the subject, says: "It is well settled that the Constitution of the State recognizes as governmental agencies the existence of counties, townships, cities and towns. They can at the will of the Legislature be changed, divided and abolished."

In *Tyrrell v. Holloway*, 182 N. C., 64, Justice Hoke cites Cooley as follows: "In the citation to Cooley the principle is stated as follows: "There is, nevertheless, one clearly defined exception to the rule that the legislature shall not delegate any portion of its authority. The exception, however, is strictly in harmony with the general features of our political system, and it rests upon an implication of popular assent which is conclusive. This exception relates to the case of municipal corporations. Immemorial custom, which tacitly or expressly has been incorporated in the several state constitutions, has made these organizations a necessary part of the general machinery of state government, and they are allowed large authority in matters of local government, and to a considerable extent are permitted to make the local laws.' "

Justice Hoke, *supra*, cites Black, 374, the author, as to the authority of the Legislature over municipal corporations. See *Dickson v. Brewer*, 180 N. C., 403.

Certainly, if the General Assembly has a right to create and abolish municipal corporations, it has within its power the authority to do lesser things with the rights of counties and its agencies.

The second issue raised by the Ashe County School Board questions the validity of the contract of hire between the deceased, Lloyd Parsons, and the Ashe County School Board.

From the testimony introduced, there was sufficient legal evidence to substantiate a contract between the deceased, Lloyd Parsons, and John Cox.

It is quite clear from the testimony that John Cox was acting as an agent of the Elkland Consolidated School Committee, and as such was an agent of the Ashe County School Board, said School Board having the authority to authorize the repair work done.

The entire job would involve only about $20.00. Testimony tended to show that the roof had to be repaired before the school could function properly. That it was really an emergency.

The incumbent officers were somewhat reticent in testifying as to irregularities in administering the school laws, but a former official readily admitted that many other contracts had been made similar to the one with Parsons, and that said contracts had been recognized by the Ashe County School Board.

Duncan, Chairman, Ashe County School Board, says they can give authority to make repairs, or they can let the Committee repair the building and it is authorized when the bill is submitted.

In this case we have a man, John Cox, Chairman of the Elkland Consolidated School Committee, holding himself out as the agent in handling matters pertaining to repairs to said school building. He has been chairman for years. The testimony tends to show that on many occasions he has contracted for certain repairs to be made. That in most every, if not all, cases, prior to this one, the parties have been paid for services rendered. Thus making him the recognized agent.

The first sentence of Section 5539, C. S., gives the Elkland School Committee "the authority to purchase supplies necessary for conducting the schools and for repairs, to an amount not to exceed in the aggregate the sum apportioned for this purpose by the County Board of Education in any one year."

An examination of the School Budget filed and approved by the Board of County Commissioners as of May, 1929, does not show an itemized statement as to necessary repairs for various school buildings, but does show that $5,700.00 was asked for under the heading "Maintenance of Plant." This amount was approved by the Board of Commissioners. This item covers the maintenance of all school property in the County, and such portions as the County may be liable for. This maintenance fund had not been disbursed at the time of said accident; in fact, it had not been collected from the tax levies; moreover, it was not apportioned.

Money was available; therefore, it cannot be said that John Cox, as school committee chairman, exceed his authority. The contract of hire was legal.

The second and last sentence of Section 5539, C. S., reads: "But nothing in this section shall be so construed as to give school committees the right to make expenditures without the order of the County Board."

The last sentence of said section stipulates that the school committee must have an "*order*" to make expenditures. What does the word "order" mean? It certainly cannot be said that it means a resolution, if it is taken in its broadest sense. It can mean but one thing, "authority." There is no definition in the "Public School Law of North Carolina" saying that the order must be in writing, or even recorded in the minutes of the School Board. If it was required that the order be recorded in the minutes, it was not the fault of Cox, if it was not. Neither does said section say that the order must be given at a meeting of the School Board. There was no evidence submitted by the School Board of Ashe that a written order was required.

It is quite natural for the officials, after the accident, and when they realized its seriousness, to be in doubt as to whether they discussed this matter with Cox, and gave an order to him.

There is positive testimony from Cox and negative from the officials of the School Board. The Supreme Court of North Carolina says give greater weight to the positive. *State v. Murray*, 139 N. C. 540.

The Commission certainly could not expect Parsons, a man with very limited opportunities and no financial resources, to ask Chairman Cox if he had authority of the County School Board to contract for twenty dollars' worth of emergency repair work to his school building. Neither could we expect him to inquire if there was money provided in the May budget to cover said cost. He was dealing with the local Chairman, and recognized agent.

The evidence clearly qualifies Lloyd Parsons as an employee of the Elkland Consolidated School District as defined in Section 2 (b) of the Compensation Law, and, as such, is an employee of the Watauga and Ashe County School Boards.

The widow and children are conclusively presumed to be dependent, under Section 39.

Willie and Edward, children of the widow, and previously supported by the deceased, were wholly dependent upon deceased as provided for in Section 39.

Award

Upon the legal evidence in this case and the findings of fact, the Commission orders an Award of compensation in favor of Mrs. Lloyd Parsons, widow; Virginia Ruth, Ruby, Adelephine, R. F., children, and Willie and Edward Parsons, children of Mrs. Parsons, and supported by deceased. Said Award shall be payable to Mrs. Lloyd Parsons, as the natural guardian of the children, at the rate of seven ($7.20) dollars and twenty cents per week, every four weeks, not to exceed three hundred and fifty weeks; and in addition thereto, the defendants shall pay the burial expenses, not to exceed $200.00, and all medical and hospital bills incurred as the result of said injury. The receipt of Mrs. Lloyd Parsons shall be sufficient proof of payment of compensation to acquit the defendants, and fully and completely discharge the defendants of all claims or demands of said minor children.

Said Award to be made against the Board of Education of Ashe County for fifty per cent of same; and against Board of Education of Watauga County and United States Fidelity and Guaranty Company for fifty per cent.

[Docket No. 188]

K. W. PFAFF, Employee, Plaintiff, v. FORSYTH COUNTY, Employer, and THE OCEAN ACCIDENT AND GUARANTY CORPORATION, Carrier, Defendants

Filed February 4, 1930

SUBROGATION.—Where agreement for Compensation has been made and approved by the Commission and the employee compromises with the third party responsible for the injuries, the employer is entitled to have such compromise settlement allowed as a credit or offset to compensation payments preventing double recovery.

ASSAULTS.—Assault by third party grounds for recovery of damages in Civil action.

Hearing before J. DEWEY DORSETT, Commissioner, at Winston-Salem, N. C., January 16, 1930.

Plaintiff represented by *Mr. John Wallace* and *Mr. R. E. Wall.*

Defendant insurance carrier represented by *Mr. James Gay,* and *Mr. R. Alton Jackson.*

Opinion by DORSETT, Commissioner.

Statement of the Case

On July 24, 1929, the plaintiff was employed by the County of Forsyth as a deputy sheriff, and while searching for a still was shot from ambush and wounded in the right leg. The Grand Jury of Forsyth returned an indictment against Robert Stafford, Harper Crews, and Robert H. Idol, charging them with a felonious assault upon the plaintiff. The record does not show, but it is assumed that a plea of guilty was entered, since the judgment upon the trial of this case recites that, "judgment be suspended." The criminal prosecution came on for trial at the July, 1929, Term of Superior Court, and the judgment recites that the sumof $2,000.00 was paid in the presence of the Court, to the plaintiff by the defendants in the criminal action. "The plaintiff claims, however, that the amount was not received by him until December, 1929."

On August 8, 1929, the plaintiff and defendants entered into an agreement for the payment of compensation and medical treatment for temporary total disability resulting from this injury, which was approved by an award of the Commission under date of August 27, 1929. On this award the defendants had paid $414.00 as compensation, and $526.75 for medical and hospital bills. The defendants on December 27, 1929, requested permission to stop payments of compensation on the ground that the plaintiff had accepted $2,000.00 as settlement from the third parties causing the injury. Permission was granted; whereupon this hearing was held.

Upon all the evidence the Commissioner makes the following

Findings of Fact

1. That the plaintiff and defendants are subject to the operations of the North Carolina Workmen's Compensation Act, and the Ocean Accident & Guarantee Corporation is the insurance carrier.

2. That on July 24, 1929, the plaintiff sustained an injury by accident that arose out of and in the course of his employment by the County of Forsyth.

3. That the plaintiff's average weekly wage is in excess of $30.00 per week.

4. That on August 8, 1929, the plaintiff and defendants entered into an agreement for the payment of compensation and medical and hospital bills by the defendants to the plaintiff. The agreement was approved by an award of the Commission under date of August 27, 1929.

5. That the defendants have paid $414.00 as compensation, and have paid $526.75 as the cost of medical and hospital charges, under the aforesaid agreement and award.

6. That the plaintiff was totally disabled because of his injuries received on July 24, 1929, from that date until December 24, 1929, and upon the latter date his disability assumed a permanent status, and the permanent loss of use of the right leg is 37½ per cent.

7. That at the July Term, 1929, of Forsyth Criminal Court, the plaintiff accepted the sum of $2,000.00 in settlement of his rights and remedies against Robert Stafford, Harper Crews and Robert N. Idol, for the tort committed upon his person; to wit, an assault with a deadly weapon inflicting the injury on July 24, 1929, resulting in the disability set out in Finding No. 6.

8. That the plaintiff has sustained no serious bodily disfigurement.

Upon the foregoing Findings of Fact, are based the following

Conclusions of Law

The plaintiff, K. W. Pfaff, being an employee of Forsyth County, they are both subject to the provisions of the Workmen's Compensation Act; and under Section 8 thereof, both are without the right of rejection. Both having accepted the provisions of the Act, or rather both being bound by the provisions of the Act, to pay and accept compensation, the rights and remedies granted under the Act are exclusive of all rights and remedies the plaintiff may have against the employer as is provided in Section 11.

In the case of *Smith v. The Virginia Railway*, 131 S. E., 440, the Court construing a similar provision in the Virginia Act, said: "That clause, however, refers only to the remedy of an employee against his employer, and it is only his right to sue his employer for damages which is barred by the acceptance of compensation."

Under Section 4 of the Act, the plaintiff was bound to accept, and the defendant to pay, compensation for injury by accident arising out of and in the course of his employment. The plaintiff sustained a temporary total disability as a result of his injury from July 24, 1929, until December 24, 1929, which, under Section 29 of the Act, entitled him to compensation at the rate of 60 per cent of his average weekly wages, subject to a maximum of $18.00 for such period. An agreement in accordance with the Act was entered into and approved by the Commission for the payment of this compensation. At the hearing it developed that the plaintiff had sustained a permanent loss of use of his right leg to the extent of 37½ per cent, which, under Section 29 (t) of the Act, would entitle him to compensation for 65.6 weeks at the rate of $18.00.

Under the Act, the plaintiff would be entitled to 22 weeks compensation at $18.00 per week, or $396.00, plus 65.6 weeks compensation at $18.00, or

$1,180.80, or a total of $1,576.80 in addition to his hospital and medical bills in the amount of $526.75; total benefits, $2,103.55. The defendants have paid $414.00 to the plaintiff as compensation, and $526.75 as hospital and medical bills, or a total of $940.75 upon the award made by the Commission.

As stated, the rights and remedies of the Act provided therein are exclusive as against the employer; Section 11, however, provides that such rights are not exclusive as against third persons inflicting the injury.

That the plaintiff could have recovered from his assailants compensatory damages for the injuries inflicted in the criminal assault made upon him by the three defendants in the criminal action will hardly be denied. In the case of *Tripp v. Tobacco Company*, 193 N. C., 616, Chief Justice Stacey cites with approval the following from the opinion of the Supreme Court of the United States, 54 U. S. 363: "By the Common as well as the Statute law, men are often punished for aggravated misconduct or lawless acts, by means of civil action, and the damages inflicted by way of penalty or punishment, given to the party injured. In many civil actions, such as libel, slander, seduction, etc., the wrong done the plaintiff is incapable of being measured by money standard and the damages assessed depend upon the circumstances . . . and may be termed exemplary or vindictive rather than compensatory." Continuing in the opinion, Chief Justice Stacey says: "Punitive, vindictive, or exemplary damages, sometimes called smart money, are allowed in cases where an injury was inflicted in a malicious, wanton, and reckless manner. The defendant's conduct must have been actually malicious or wanton, displaying a spirit of mischief towards the plaintiff, or of a reckless and criminal indifference to his rights."

The well established principles cited in the foregoing certainly recognize that the plaintiff had certain rights and remedies against the third persons who were responsible for his injuries. The judgment entered in the criminal indictment No. 2487, does not recite the purpose for which the $2,000.00 was paid in the presence of the Court to the plaintiff by the defendants therein. It must be assumed, however, it was in full satisfaction of the rights and remedies the plaintiff had against his assailants—certainly not for failure to prosecute the felony charge against them. The plaintiff in this hearing testified as follows:

Q. What do you contend the money was paid to you for?
A. Well, for my disability on account of him shooting me.

Q. In other words, you did not accept the money not to prosecute these people?
A. No, sir.

The foregoing certainly warrants the conclusion that the plaintiff had certain rights and remedies against the third persons who inflicted his injuries. The judgment recites that the money was paid in open court, July Term, 1929, although the plaintiff states that he did not receive the money until December, 1929. Under the findings set out above, the plaintiff is entitled to compensation for a total amount of $2,103.55. This amount could not have been determined until an absolute recovery from injuries was had, or a permanent disability could be determined. The injury could have resulted in a total disability running the total compensation payable to an amount of $6,000.00, or could have been for the temporary disability plus the entire loss of the leg, an amount greatly in excess of $2,000.00, the amount for which the plaintiff compromised his rights and remedies against the third persons.

Considering these facts, as well as the plaintiff's admission that the $2,000.00 was not paid until December 1929, the plaintiff was entitled to receive from the defendants herein an agreement for compensation, and receive payments thereunder.

Having entered into an agreement, and the same having been approved by an award of the Commission, the plaintiff thereby assigned any rights and remedies he had against the third parties to the defendants herein to the extent of payments made under the award. This is clearly the language of Section 11.

The defendants may have the right to complain that the compromise settlement of $2,000.00 made with the third parties has prejudiced their rights, which presents a question that this Commission need not determine since it is one that properly comes before another tribunal.

In support of what has been said, the Virginia Court in *C. & O. Railroad v. Palmer*, 140 S. E., 836, said: "It soon became apparent that an employer might be mulcted in compensation who was nowise at fault. The right of the employee to sue the wrongdoer had not been affected, and it was then possible for him to duplicate his recovery and to secure damages from two sources. Such a situation called for relief; it was given in the amendment of 1920 and written into the second paragraph of Section 12. It gave the employer the right to recover from the wrongdoer whatever he had actually had to pay, and it took from the employee the right *pro tanto* to a double recovery; but beyond this, it left the employee's right to recover as it was before." The same provisions as were there being construed are found in Section 11 of the North Carolina Act.

Section 46 provides that a review of an award shall not affect my moneys paid. Since the defendants would be due under the award to pay the plaintiff a total of $2,103.55, they are entitled to have applied as a credit against this the amount of $2,000.00 recovered in December by the plaintiff from the third parties. The defendants would have been due the plaintiff $103.55 as compensation, and since the defendants have paid a total of $940.75, they have overpaid the plaintiff $837.20.

This Commissioner has no authority to direct or order that the plaintiff reimburse the defendants this over-payment of $837.20; and as to the defendants herein being estopped by the judgment of the July Term, 1929, in Criminal Court, from proceeding against the third parties for its collection, presents a question for another tribunal.

For the reasons assigned it is directed that there be issued the following

Award

That the defendants pay to the plaintiff compensation at the rate of $18.00 per week for a period of 22 weeks, from July 24, 1929, and thereafter pay compensation at the rate of $18.00 per week for a period of 65.6 weeks;

that the defendants also pay all the medical and hospital bills incurred, to the proper parties. Upon the foregoing payments the defendants will take credit for $2,000.00 collected by the plaintiff from the third parties causing the disability.

Concerning the costs of this hearing, each side will take care of its own.

[Docket No. 120]

PAUL McLEAN, Employee, Plaintiff, v. MICHAEL & BIVENS, Employer, and GLOBE INDEMNITY COMPANY, Carrier, Defendants

Filed February 5, 1930

Boils.—Infection from having arms constantly in impure grease not an injury by accident.

Hearing before J. Dewey Dorsett, Commissioner, at Gastonia, N. C., January 7, 1930.

Opinion by Dorsett, Commissioner.

The record shows that the plaintiff claims that the boils from which he is now suffering were caused by keeping his arms constantly in impure grease in the regular course of his duties in repairing electrical motors, transformers, switches, etc. The extent of his injury consists of boils on both arms and hands in a large number. These boils were from the elbow to the hands.

Paul McLean was regularly employed by Michael & Bivens, and in asking for compensation contends that the boils were caused by a skin infection due to contact had with the dirty oil used in the course of his employment.

The plaintiff was attended by Dr. W. W. McChesney, who says that he treated him for small boils on his hands and arms, some fifteen or twenty of them in number, and that from the history of the case he was not able to say just what caused the boils, but that he was told by the plaintiff that it was necessary in his work to keep his hands and arms in transformer oil most of the time. The doctor testified that he found no wounds or bruises, but just boils.

Dr. McConnell was examined, and his testimony is that he found the plaintiff suffering from an infected hand, which showed marked swelling, and the history he got of the case was that the plaintiff was working in transformer oil, and it was his opinion that the trouble came from this dirty oil and that the infection probably developed gradually.

In the evidence the trouble could not be attributed to any single contact with the oil; neither a time nor a particular accident or happening can be pointed out as the beginning of the infection. There is no evidence that the infection was due to any cut or injury. It entered and infected him through normal and natural process. There is nothing to show that there was an accident or an injury. The evidence does not bring the plaintiff's ailment within Section 2 (f) of the North Carolina Workmen's Compensation Act, which is as follows: "Injury" and "personal injury" shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident.

We can find no proof to show that the employee sustained an accident. He simply developed an occupational disease that developed gradually from the employment. The case is therefore dismissed.

Each side will pay its own costs.

[Docket No. 174]

L. C. NANCE, Employee, Plaintiff, v. TOMLINSON CHAIR COMPANY, Employer, and LIBERTY MUTUAL INSURANCE CO., Carrier, Defendants

Filed February 5, 1930

DERMATITIS.—Disease caused by use of paints and varnish not an injury by accident.

Hearing before J. DEWEY DORSETT, Commissioner, at Greensboro, N. C., January 6, 1930.

Opinion by DORSETT, Commissioner.

In this case the first report this Commission had concerning L. C. Nance's injuries, shows that on October 28, 1929, the plaintiff reported a breaking out on his face and hands, and there was no apparent cause. The Burrus Clinic report shows that they examined the plaintiff on October 29, 1929, and the plaintiff stated that about two weeks previous he noticed a breaking-out on his hands and arms; also swelling and itching. His trouble was diagnosed as dermatitis, probably due to the use of varnish. The carrier denies compensation on the ground that the plaintiff's injury is the result of an occupational disease.

The plaintiff at the time of the alleged accident was regularly employed by the Tomlinson Chair Company. The Liberty Mutual Insurance Company is the insurance carrier and is an intervening party to this proceeding. The evidence of the plaintiff is that his employer put him to work with unsafe and dangerous acids and materials, and because of this he suffered the disability for which he is asking compensation.

Dr. Burrus of High Point, N. C., in his testimony says that it is a case of dermatitis; explaining this by saying that his trouble is a breaking out or infection of the skin; that when he examined him, he had some swelling, and it is commonly thought that it came from some dye, paint remover, or varnish used in the furniture plant where this employee was employed. The Doctor further testified that lots of folks would not be affected by this at all; that it affected some people, and others it did not, owing to the type of skin.

In the evidence, the trouble the plaintiff complains of could not be attributed to any single contact with any dye, varnish, or paint remover; neither to any time, place or incident can any happening be pointed out as the beginning of the breaking-out of dermatitis. There is nothing in the record to show that there was an accident or an injury. The evidence certainly does not bring this trouble within Section 2 (f) of the Compensation Law, which reads: "Injury" and "personal injury" shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident.

The North Carolina Workmen's Compensation Law applies only to accidental injuries arising out of and in the course of the employment. Its scope does not include disability resulting from an occupational disease. The plaintiff's occupation required him to work around paints, varnishes, etc., commonly used in the furniture manufacturing business, and the dermatitis developed, if the medical testimony is to be believed, from this source. No specific accidental occurrence was established, and in such a case compensation cannot be awarded.

The case is dismissed. Each side will pay its own costs.

[Docket No. 128]

GEORGE HERBERT REEVES, alias GEORGE WILSON, Employee,
Deceased, FRANCES WILSON, F. E. ALLEY, JR., Ancillary
Administrator, J. R. GARDNER, Administrator, Plaintiffs,
v. PARKER-GRAHAM-SEXTON, Inc., Employer, and
TRAVELERS INSURANCE COMPANY,
Carrier, Defendants

Filed February 5, 1930

COMMON LAW WIFE.—Common law marriage not recognized by either North Carolina or Tennessee: therefore common law wife not a widow under the act.

PERSONAL REPRESENTATIVE.—Under Section 40, where deceased leaves no dependents, personal representative entitled to same amount as those wholly dependent.

Hearing before J. DEWEY DORSETT, Commissioner, January 10, 1930, at Waynesville, N. C.

The plaintiffs were represented as follows:

Alley & Alley, Attorneys of Waynesville, N. C., represented the next of kin.

Crawford & Kirkpatrick, Attorneys of Waynesville, N. C., represented Frances Wilson in North Carolina.

Charles L. Householder, Attorney of Knoxville, Tenn., represented Frances Wilson in Tennessee.

The defendants were represented by *Mr. J. B. Smathers*, of the law firm of Rollins & Smathers, Asheville, N. C., and *Messrs. A. C. Newsom* and *Sam Franklin* of the Travelers Insurance Company.

Opinion by DORSETT, Commissioner.

Statement of the Case

The record in this case discloses the following agreements:

1. That George Herbert Reeves, colored, sometimes known as George Wilson, (the employer's record in this case shows that the deceased was going by the name of George Wilson) received a fatal accident on October 27, 1929, while in the employ of Parker-Graham-Sexton, Inc., at Sterling Creek, near Waterville, in Haywood County, North Carolina.

2. That the said injury resulting in the death of the deceased arose out of and in the course of his employment.

3. That the employer and the employee were subject to the provisions of the North Carolina Workmen's Compensation Act at the time of the fatal accident, neither having rejected the said Act.

4. That the average weekly wage being earned by the deceased at the time of his death was $24.78.

5. That the dependents of the deceased, if any, are entitled to compensation; and if it is found that there are no dependents, compensation is payable to the personal representative of the deceased, as provided by Section 40 of the Workmen's Compensation Act.

This case presents two questions for determination. First, for the first time since the compensation law went into effect, the Commission is asked to find that a woman living in fornication and adultery with the deceased is entitled to compensation as a dependent. Frances Wilson of Tennessee, is claiming compensation as a common law wife. The evidence of this woman is to the effect that she lived for the first time with the deceased in the State of Tennessee; that she met the deceased about one week before they both came to North Carolina; that she lived in Tennessee with the deceased as his wife for a period of one week, and that they both came to North Carolina and lived together as man and wife for a period of about two years, and up until the time the deceased met with the fatal accident which resulted in his death. Is Frances Wilson, then, who claims to have been the common law wife of George Wilson, a dependent of the said George Wilson, within the intent and meaning of the North Carolina Workmen's Compensation Act? The second question presented in this case is: What amount of compensation is payable to the personal representative where there are no dependents?

From all the evidence, the Commissioner arrives at the following

Findings of Fact

1. The deceased, George Herbert Reeves alias George Wilson, received a fatal injury on October 27, 1929, while regularly employed by the Parker-Graham-Sexton Company, Inc.

2. The accident resulting in the fatal injury of the deceased arose out of and in the course of his employment.

3. Both the employer and the employee are bound by the provisions of the North Carolina Workmen's Compensation Act. The Travelers Insurance Company is the insurance carrier, and is intervening as a party defendant.

4. The average weekly wage of the deceased was $24.78.

5. Frances Wilson, who claims to be the common law wife of the deceased, lived with the deceased for more than two years in fornication and adultery.

6. The deceased at the time of his death left no dependents wholly or partially dependent upon his earnings for support at the time of the accident, and under Section 40 of the North Carolina Workmen's Compensation Act, the personal representative of the deceased is entitled to receive compensation as provided by Section 38, commuted and paid in a lump sum.

Conclusions of Law

Section 39 of our Act defines dependents. The Section relates that a widow, a widower, and/or a child shall be conclusively presumed to be wholly dependent for support upon the deceased employee . . . and shall be entitled to receive the benefits of this Act for the full period specified in the Act. In compensation acts in general, the widow of a workman killed in his employment is usually entitled to compensation regardless of the question of dependency; the mere fact of widowhood dispenses with proof of dependency. As used in a statutory provision that a wife shall be conclusively presumed to be dependent for support on a husband "with whom she lives" or "with whom she was living at the time of his death," the words quoted mean living together as husband and wife in the ordinary acceptation of these words, but this presumption does not arise where the alleged wife is not a legal wife. In a California case, *Rossi v. The Standard Oil Company*, 2 Cal., I. A. C., December 307, it was held that where the mother of an illegitimate child is actually living with the father of the child as his wife, and actually wholly dependent upon him, and it is provided that such child is conclusively presumed dependent only in cases of "there being no surviving parent, member of the family of such employee," such mother, living in illicit relations with the employee, is not a member of his family, and therefore not considered a dependent, within the meaning of that Act. If Frances Wilson is entitled to compensation at all, it is in her capacity as the widow of George Wilson, for she clearly comes within no other class of dependents named in the North Carolina Workmen's Compensation Act, and it is the rule under a majority of the compensation acts that "no person is entitled to compensation unless he is within one of the enumerated classes." 28 R. C. L., citing L. R. A., 1917D, 157; L. R. A. 1918F, 483. While a widow, under the provisions of Section 39 of our Act is conclusively presumed to be wholly dependent for support upon the deceased employee, "to warrant a payment of compensation it must be shown that the applicant was married to the decedent before the date of the injury, and that the marriage was such as the law recognizes." 28 R. C. L., 778, citing L. R. A., 1918F, 484. In 28 R. C. L., at page 776, it is said: "As for the woman who cannot produce a marriage certificate, the bench is cold and unsympathetic. She is not a member of the employee's family, and consequently is not entitled to compensation."

Our Act, in defining the term "widow," in Section 2 (n), is as follows: "The term 'widow' includes only the decedent's wife living with or dependent for support upon him at the time of his death." In this connection it seems to us that the word "widow" implies a lawful marriage. The word "wife" has been defined as follows: "A woman who is united to a man in the lawful bonds of wedlock." Another definition is: "The lawful consort of a man."

If Frances Wilson was the lawful wife of George Wilson, she is now his lawful widow, and is entitled to compensation; if she was not the lawful wife of George Wilson, she is not now his lawful widow, and compensation must be denied. The supposed marriage between them was consummated, if at all, either in North Carolina or in Tennessee, and its validity must, therefore, be tested by the laws of those States, for "the general rule is that the validity of a marriage is determined by the law of the place where it was contracted." 38 C. J., 1276; *State v. Schlachter*, 61 N. C., 520; *State v. Ross*, 76 N. C., 242. Fortunately, our Supreme Court has dealt with this question in a number of cases, notable among which is that of *State v. Wilson*, 121 N. C., where it is said by Clark, Judge, at pages 655 and 656:

"Consent is essential to marriage, but it is not the only essential. 14 Am. & Eng. Enc., 472, note 3. In this State it must be acknowledged in the manner, and before some person, prescribed by the Section of the Code just cited. (C. S. 2493). No celebration was required by the Common Law prior to the Council of Trent, nor by the Civil Law, nor by the law in Scotland, nor in many States in this Union. In some States the question has never been decided. In other States celebration before some person authorized by law is held essential as (after some hesitation) has been held to be the common law in England. Stewart Marriage and Divorce, Section 90; 14 Am. & Eng. Enc., 515. In the latter class is North Carolina.

"There is no such thing as marriage simply by consent in this State. Ruffin, C. J., in *State v. Samuel*, 19 N. C., 177, and *State v. Bray*, 35 N. C., 290; Gaston, J., in *State v. Patterson*, 24 N. C., 346; Pearson, C. J., in *Cooke v. Cooke*, 51 N. C., 583, and the same is recognized as the law in the more recent cases of *State v. Parker*, 106 N. C., 711, and *State v. Melton*, 120 N. C., 591."

It has been held by our Court that cohabitation between an Indian man and woman, according to the customs of their tribe, by which the parties are at liberty to dissolve the connection at liberty, does not constitute marriage. *State v. Ta-cha-na-tah*, 64 N. C., 614, where it is said: "There is but one law of marriage in this State, which applies equally to all citizens." It was accordingly held that since the rites of matrimony had never been performed between the defendant and his so-called wife, she was a competent witness against him, and was not excluded under the statute providing that no husband or wife shall be competent or compellable to give evidence against the other in any criminal action or proceeding. C. S. 1802.

In considering the question before us, we are keeping in mind that the pretended marriage was contracted or occurred in Tennessee or North Carolina. If the supposed marriage had been consummated in a State where common law marriages are lawful, and the parties thereto had subsequently moved to North Carolina, we would be faced with an entirely different question, the general principle being that the validity of a marriage is determined by the laws of the place where it was contracted and, if valid there, it will be held valid everywhere. But, it is admitted in this case that Frances Wilson and the deceased lived together only in the States of North Carolina and Tennessee, and the status of their relations must, therefore, be determined by the laws of those States.

In a most recent case, filed January 18, 1930, the Supreme Court of the State of Tennessee has held that an alleged common law wife was not entitled to compensation. *Memphis Fertilizer Co. et. al. v. Beatrice Small, et. al.* McKinney, Judge in that case, said: "We are of the opinion that the legislature did not intend to provide compensation for a woman who has purposely and knowingly lived in unlawful cohabitation with an employee at the time of his death. In the absence of an express provision to that effect, we would be unwilling to extend the act to such a person as a matter of public policy."

The following instances, involving the rights and obligations of husband and wife, demonstrate the utter absurdity of the suggestion that Frances Wilson was the lawful wife of George Wilson, for if George Wilson were alive today and living with Frances Wilson, under the admitted circumstances in this case:

1. Frances Wilson could not maintain an action for divorce against him, for such an action presupposes a valid marriage. 19 C. J., 76; C. S. 1659.

2. She could not maintain a proceeding for alimony against him, because that remedy implies a lawful marriage. 19 C. J., 212, 582; C. S. 1665, 1666, 1667.

3. She could be compelled to testify against him in a criminal action, for before a wife will be excused from giving evidence against her husband, under the provisions of C. S. 1802, it must be shown that she was lawfully married to him. *State v. Ta-cha-na-tah*, 64 N. C., 614.

4. If, after having lived with Frances Wilson, under the admitted circumstances in this case, George Wilson had subsequently married another woman, he could not have been convicted of the crime of bigamy, because one of the essentials of that crime would be lacking, to wit, a prior legal marriage. 7 C. J., 1168. Clark's Criminal Law, 354; C. S. 4342.

5. George Wilson and Frances Wilson were subject to indictment, and under the admitted facts in this case, would have been convicted, for fornication and adultery every day they lived together. C. S. 4343; Clark, J. in *State v. Wilson*, 121 N. C., 650, 657, commenting upon the facts in *State v. Brown*, 119 N. C., 825; *State v. Kennedy*, 76 N. C., 251.

6. George Wilson, if he had abandoned and failed to support Frances Wilson, could not have been prosecuted, under C. S. 4447, because that statute "refers to abandonment by a husband, presupposing a valid marriage." 30 C. J., 1104.

7. Frances Wilson, upon the death of George Wilson, would not be entitled to a year's support, under C. S. 4108. 24 C. J., 242, par. 783, where it is said: "The widow is invariably entitled to the benefit of the statutory provision for support and maintenance, but in order to have the benefit of such a statute, she must have been lawfully married to decedent."

This is the first time that the North Carolina Industrial Commission has been called upon to determine the status of parties to a marriage not performed in accordance with the plainly expressed provisions of our statutes. C. S. 2493. The decision of this Commission in the instant case will necessarily be one of far reaching effect, and to sustain the so-called marriage in this case would not only be in conflict with the consistent holdings of our Supreme Court, but it would also be alien to the customs and ideas of our people, and would shock their sense of propriety and decency. Grave considerations of public policy forbid it. That it would tend to impair the public estimate of the sanctity of the marriage relation, there can be no doubt. It would obscure the certainty of the rights of dependents designated in our compensation law. It would open the door to false pretenses of marriage, and would invite and encourage impostors to contest the legitimate claims of helpless dependents, and finally, it would place ordained matrimony on the same level with common lasciviousness. We believe that the North Carolina Workmen's Compensation Act should be interpreted and construed as any other public statute, and the assumption that the General Assembly, in the enactment of this law, intended to reward parties to a relationship deliberately entered into in open defiance of the penal laws of our State and against public morals, is a violation of the most fundamental canons of statutory construction.

George Herbert Reeves, alias George Wilson, leaving no dependents, the record discloses the fact that the personal representatives who have properly qualified as such are J. R. Gardner of Washington County, Tenn., and F. E. Alley, Jr. of Haywood County, N. C. Section 40 of the Act provides: "If the deceased employee leaves no dependents, the employer shall pay to the personal representative of the deceased the commuted amount provided for in Section 38 of this act, less the burial expenses which shall be deducted therefrom." This Commission in *Freeman v. B. & N. Motor Company and The Maryland Casualty Co.*, Docket No. 216, has held that the personal representative where there are no dependents is entitled to recover under Section 38, the same amount that those wholly dependent would be entitled to recover, commuted and paid in a lump sum as provided for in Section 44, less, of course, burial expenses as provided for in Section 40.

Award

The defendants will pay to J. R. Gardner and F. E. Alley, Jr., the personal representatives of the deceased, the sum of $4,497.32, less actual burial expenses not to exceed $200.00. This is the commuted amount of $14.87 times 350 weeks, less the burial expenses. This amount is the compensation due for a period of fifteen weeks at the rate of $14.87 per week, or $223.05, to and including February 8, 1930, and the commuted value of the future installments of 335 weeks due subsequent to February 8, 1930, at the rate of $14.87 per week, or $4,274.27; making the total amount payable —$4,497.32 from which shall be deducted actual burial expenses not to exceed $200.00.

Concerning the costs of this hearing, each side will pay its own.

An attorneys' fee in the amount of $500.00 payable to Alley & Alley, Attorneys of Waynesville, N. C., is approved, and the defendants are ordered to pay direct to Alley & Alley that amount. The balance will be paid to the personal representatives, J. R. Gardner and F. E. Alley, Jr., to be disbursed by them as the law directs.

[Docket No. 216]

HAROLD G. FREEMAN, Deceased, W. D. PENDLETON, Administrator, Plaintiffs, v. B. & N. MOTOR COMPANY, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed February 4, 1930

PERSONAL REPRESENTATIVE.—Deceased employee leaving no dependents, personal representative entitled to payment of commuted value of 60 per cent of average weekly wages of deceased for 350 weeks less funeral expenses.

Hearing before T. A. WILSON, Commissioner, at Oxford, N. C., on January 23, 1930.

Plaintiffs represented by *Mr. B. S. Royster, Jr.*, Attorney, Oxford, N. C.

Defendants represented by *Parham & Lassiter*, Attorneys, and *S. W. Bailey*, Adjuster, Maryland Casualty Company, 517 Odd Fellows Building, Raleigh, N. C.

Opinion by WILSON, Commissioner.

Counsel representing plaintiffs and defendants agree upon the following facts:

W. D. Pendleton is the duly appointed, qualified and acting administrator of the estate of the late Harold G. Freeman, deceased, having been appointed by and qualified before the Clerk of the Superior Court of Granville County, and that the administration of said estate is still existing in Granville County; that at the time of the death of said intestate, he was in the employ of Messrs. J. M. Blaylock and J. H. Nelms, trading as and doing business as under the style and firm name of B. & N. Motor Company; that said interstate came to his death while about his employer's business and in line of his employment; that the average weekly wage was $22.00 per week. It is further admitted that the deceased was to have been twenty years of age some time in January, and that the Maryland Casualty Company is the carrier for the insured under the provisions of the Workmen's Compensation Act.

Counsel for the plaintiffs admits that at the time of plaintiff intestate's death, plaintiff intestate had no person or persons wholly or partially dependent upon plaintiff intestate for his or their support. Plaintiff intestate left surviving him the following:

J. E. Freeman, father
Lucy Minta Freeman, stepmother
A. C. Freeman, brother, age 25
Leonard H. Freeman, brother, age 23
Dorenda Freeman, sister, age 22
James Edward Freeman, half-brother, age 11
Fannie Lee Freeman, half-sister, age 8
Robert Lee Freeman, half-brother, age 5
Benjamin Russell Freeman, half-brother, age 7

The contention of the plaintiffs is that they are entitled to recover under Section 29 and Section 40.

The burial expenses have been paid by the insurance carrier; all medical bills with the exception of one that has not yet been rendered, have been paid by the carrier.

Findings of Fact

1. That the deceased and dependents had accepted the provisions of the Compensation Law, and that Maryland Casualty Company is the carrier.

2. That deceased was accidentally injured on November 17, 1929, while regularly employed by said defendant, and died the same day as a result of said injuries; that said accidental injuries arose out of and in the course of the employment of said deceased by said defendant.

3. The said deceased had no dependents.

4. That W. D. Pendleton is the duly appointed, qualified and acting administrator of the estate of said deceased, and as such is the personal representative.

5. That the burial expenses have not been paid by the carrier and that all medical bills except one has been paid by carrier.

6. That said personal representative is entitled to the amount provided for in Section 38 for those wholly dependent, but commuted and paid in a lump sum as provided for in Sections 40 and 44, less the burial expense as provided for in Section 40.

7. That the average weekly wages were $22.00.

Conclusions of Law

The only issue involved in the above-styled case is, does the "personal representative" receive compensation when there are no dependents, whole or partial?

There are three references in the Compensation Law to "personal representative." The first is found in Section 11, which was in the original bill.

It provides that this law is the exclusive remedy of an employee, including his personal representative. The second is found in the last sentence of Section 29. The third is found in Section 40, and refers back to Section 38.

Section 29: "Where the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such total disability, a weekly compensation equal to 60 per cent of his average weekly wages, but not more than eighteen dollars, nor less than seven dollars, a week; and in no case shall the period covered by such compensation be greater than four hundred weeks, nor shall the total amount of all compensation exceed six thousand dollars. In case of death the total sum paid shall be six thousand dollars, less any amount that may have been paid as partial compensation during the period of disability, payable in one sum to the personal representative of deceased."

Section 40: "If the deceased employee leaves no dependents, the employer shall pay to the personal representative of the deceased the commuted amount provided for in Section 38 of this act, less the burial expenses which shall be deducted therefrom."

Because the "Personal representative" provisions are not clear when an attempt is made to construe them in the light of other sections of the law and the principles underlying compensation, it is necessary to get the intent of the General Assembly, as these provisions were inserted in the original act in the Senate.

There were two compensation bills introduced in the 1929 General Assembly and printed. Another was introduced but not printed. Out of these two bills, a compromise was reached outside the legislative hall. This bill was known as the Committee Substitute.

The present law provides in Section 29, for six thousand dollars where the original provided for five thousand five hundred dollars, and one sentence was added thereto, as an amendment, to wit: "In case of death the total sum paid shall be six thousand dollars, less any amount that may have been paid as partial compensation during the period of disability, payable in one sum to the personal representative of the deceased."

The original Section 29 had reference solely to "total incapacity" to work. The amendment is general in nature and meaningless when the Commission attempts to construe same. It conflicts with other sections of the law and the principle of compensation.

Section 38 lays down three rules for payment of compensation where there is dependency, to wit: First, for those wholly dependent; second, for those partially dependent, and third, for aliens.

It is quite evident that the amender of Section 29 contemplated death as a result of and while total incapacity continued. But said amender left the realm of compensation, which, in principle, provides for those who are dependent, and says that six thousand dollars shall be paid to the personal representative, which means that the money would be distributed according to law, and not according to dependency. Dependents would share equally with others of equal kin.

Section 38 not only provides under the compensation law, as to what dependents shall receive according to degree of dependency, but provides in minute detail how it shall be figured. It also contemplates death while total disability still continues; therefore, the amendment to Section 29 is meaningless because Section 38 was not changed to conform thereto. Section 39 defines dependents. Section 37 provides for payment of compensation in case of death from some other cause, but while receiving compensation under Section 31 for specific injuries. Said Section also provides for death as a result of a compensable accident, and still receiving compensation under Section 31. Section 44 provides for lump sum payments.

Therefore, with all degrees of dependency provided for in specific sections, the Commission has to consider but one other legally interested party, to wit: next of kin, or personal representative.

"Personal representative" appears three times in the law. It is found in the amendment to Section 29, and in Section 40 as the result of said section being re-written in the form of an amendment to the original act; also in Section 11.

The original Section 40 provided funeral benefits for a deceased employee no dependents. Section 41 provides that total compensation shall in no case exceed $6,000.00.

Therefore, the Commission can see no meaning to the last sentence in Section 29. The amendment evidently was made by some one who did not have the Compensation Act as a whole in mind.

The original Section 40 provided funeral benefits for adeceased employee who left no dependents, and $500.00 payable to the Commission to be used for rehabilitation purposes.

The Commission can see some reason and logic in Section 40. It was placed there to help eliminate an evil that has grown up as a result of compensation laws, to wit: discrimination against employees with large families or dependents.

Compensation rates are adjusted according to the loss experience of each employer. An employer who has sustained several deaths among his employees with large families, as a result of accidental injuries arising out of and in the course of their employment, would naturally have a much greater loss ratio than the employer who had an equal number of deaths among employees without dependents, and said employer would only have to pay funeral expense, as is provided for in many laws, or an additional nominal sum into a special fund as provided for in the original Section 40; also some states provide for a special fund for second injuries and rehabilitation work.

This abuse of the compensation law has worked hardships on heads of large families in some states when they seek employment. Under the law of property rights this procedure is good business, but under the law of human rights it is poor business.

North Carolina is noted for its large families.

Those who heard the Senatorial debate on the compensation law know that the General Assembly attempted through Section 40 to protect the rights of these large families in the field of employment. This section is in harmony with Section 3465, C. S., and the provisions of the Federal Employers' Liability Act.

The intent of the Legislature and the words actually used in Section 40 make it difficult for the Commission to place the proper construction on same.

Section 40 reads: "If the deceased employee leaves no dependents, the employer shall pay to the personal representative of the deceased the commuted amount provided for in Section 38 of the act, less the burial expenses, which shall be deducted therefrom."

Section 38 has no reference to a commuted amount except as it refers to aliens, and they are paid one-half of said amount.

Section 44 does stipulate how any and all future compensation may be commuted. Therefore, any and all future compensation payable under Section 38 can be commuted in accordance with Section 44.

This leaves but one question to be determined by the Commission: Upon what basis is the commuted amount to be figured, if any is to be paid the personal representative?

Section 38 provides means of figuring compensation for those (1) wholly dependent on the basis of 60 per cent of the average weekly wage of deceased, not to exceed $18.00 compensation nor less than $7.00, and not to exceed three hundred and fifty weeks (this is also limited by provisions of Section 41); (2) those partially dependent shall equal the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of his injury; (3) refers to aliens and how to commute.

If the Commission should attempt to take the rule provided for partial dependents, we would never know how to figure same, because it is not based upon known facts, but problematical facts, for the deceased would have had partial dependents if he had contributed to any one if they were not wholly dependent.

In the third provision of Section 38, we have reference to aliens only. It cannot have reference to citizens.

Therefore, the Commission is left with the first provision as the only alternative, based upon dependents wholly dependent. Under this provision we can get all the facts as to wages and would-be compensation if there were dependents wholly dependent.

The Commission realizes full well that with this interpretation another evil will be set up that will, to a degree, offset the remedy. That is, where there is a partial dependency of limited proportions, a temptation will be created to deny such partial dependency for the greater recovery. Often this will probably mean less for the actual partial dependent or dependents.

Seldom a remedy can be prescribed without some means being discovered whereby it can be abused, just as some employers feel they have potentially hazardous risks in elderly employees.

Compensation is awarded under Sections 38 and 40.

Award

The Commission awards W. D. Pendleton, as the duly appointed, qualified and acting administrator of the estate of the late Harold G. Freeman, deceased, the commuted amount of $13.20 compensation for three hundred and fifty weeks, less the burial expenses, which shall be deducted therefrom. All medical bills shall be paid by the carrier.

[Docket No. 192]

CHARLES LOMINAC, Employee, Plaintiff, v. AMERICAN FOREST PRODUCTS CO., Employer, and UNITED STATES FIDELITY AND GUARANTY CO., Carrier, Defendants

Filed February 6, 1930

RECURRENCE OF DISABILITY.—Disability recurring traceable to initial injury, entitles employee to compensation against employer in whose service at time of injury.

Hearing before J. DEWEY DORSETT, Commissioner, at Sylva, N. C., January 13, 1930.

Plaintiff represented by *Mr. C. C. Buchanan,* Attorney of Sylva, N. C.

Defendant represented by *Mr. F. M. Tongue* of Asheville, N. C., Adjuster for the United States Fidelity and Guaranty Company.

Opinion by DORSETT, Commissioner.

Statement of the Case

While in the employ of the defendant, American Forest Products Co., on August 28, 1929, the plaintiff sustained an injury wherein the muscles of his right forearm were severed to the bone. On September 18, 1929, the plaintiff returned to work at one-half his former weekly wage. He worked under this condition for one week, and then returned to his former work at regular wage, the same as he received before the accident.

On October 12, 1929, along with four other employees, the plaintiff was "laid off." Thereafter the plaintiff procured light work for short periods, not earning more than $10.00 during the time intervening between October 12, 1929, and the date of this hearing. The plaintiff claims that his disability because of the injury of August 28, 1929, prevented him from doing the work he had obtained since leaving the defendant's employ.

The insurance carrier, defendant, claims that an agreement has been entered into for the payment of compensation, and that compensation has been paid. The files of the Commission do not show that such an agreement has been entered into, nor do the files contain any final receipt. However, the files do contain a copy of a check that was supposed to have been tendered to the plaintiff.

Upon all the evidence the Commissioner makes the following

Findings of Fact

1. That on October 28, 1929, the plaintiff, while in the employ of the defendant American Forest Products Company, sustained an injury by accident that arose out of and in the course of the employment.

2. All the parties to this proceeding are bound by the provisions of North Carolina Workmen's Compensation Law, and the United States Fidelity and Guaranty Company is intervening as a party defendant due to the fact that the said insurance company is the insurance carrier.

3. The plaintiff's average weekly wages were $18.00.

4. The plaintiff was temporarily totally disabled from August 28, 1929, to September 18, 1929, because of his injuries.

5. For one week after September 18, 1929, the plaintiff was partially incapacitated, and during this week his average weekly wage was $9.00.

6. On October 12, 1929, the plaintiff's disability because of the injuries on August 28, 1929, recurred, and except to the extent of $10.00 the plaintiff has been incapacitated because of the injury of August 28, 1929, "to earn the wages which the employee was receiving at the time of the injury in the same or any other employment" . . . since that date and until the date of this hearing, and probably will be incapacitated for some time in the future.

7. The defendants have not tendered the plaintiff employment suitable to his capacity.

Upon the foregoing Findings of Fact, are based the following

Conclusions of Law

Section 56 of the Act requires that agreements for the payment of compensation shall be filed by the employer with the Commission. Section 18½ (a) provides that payments of compensation under the agreements are due fourteen days after the signing of the agreements. Section 18½ (d) and (e) provides penalties for the failure to continue payments under an agreement, and for failure to file receipt for final payment, unless excused by the Commission. The carrier, we take it, through an oversight on its part, has ignored all the above requirements of the Act. The employer wrote the Commission stating that the plaintiff was entitled to compensation, but that the carrier had informed them that so far as it was concerned the case was closed. The file contains no records from the carrier indicating that the case has been properly closed.

The medical evidence at the hearing disclosed that this plaintiff had sustained a severe injury. This same information was imparted to the carrier at the time of the injury, in the medical report. The medical testimony shows that the plaintiff will be disabled for at least a month from the date of this hearing. The oversight on the part of the defendant insurance carrier in not giving this case the attention it deserved has probably made the resulting cost much larger than it otherwise would have been.

Upon the foregoing it is directed that there be issued the following

Award

The defendants are directed to pay to the plaintiff compensation for temporary total disability from August 28, 1929, until September 18, 1929, at the rate of $10.80 per week, and thereafter for one week pay to the plaintiff compensation for partial disability for one week at the rate of $5.40 per week, subject to any payments for compensation that have already been made, and beginning from October 12, 1929, pay the plaintiff compensation for temporary total disability not to exceed 400 weeks from August 28, 1929. All accrued payments to be made in a lump sum to date of receipt of this award; thereafter, payments to be made weekly.

The defendants are to pay all hospital and medical bills incurred, as well as the costs of this hearing.

[Docket No. 248]

W. H. AYCOCK, Employee, Deceased, MRS. TEMPIE AYCOCK, Widow of Deceased, Plaintiff, v. GEORGE H. COOPER, Employer, Defendant

Filed February 6, 1930

NON-INSURANCE.—Employer failing to prove insurance when subject to the act required to make bond to cover compensation payable.

CASUAL.—Employment though not continuous is not casual. Casual construed as occasional or incidental without regularity. If employment be for a day or a month not casual.

DEPENDENTS.—Entitled to 60 per cent of average weekly wage for a period of 350 weeks plus funeral expenses not to exceed $200.00.

Hearing before J. DEWEY DORSETT, Commissioner, January 24, 1930, at Louisburg, N. C.

Plaintiff represented by *Mr. O. B. Moss*, Attorney, Spring Hope, N. C.

Defendants represented by *Messrs. Yarborough & Yarborough*, Attorneys, of Louisburg, N. C.

Opinion by DORSETT, Commissioner.

Statement of the Case

On December 31, 1929, the deceased while in the employ of the defendant, George H. Cooper, was scalded, the injuries resulting in death. The defendant, about July 1, 1929, procured an insurance policy from the Travelers Insurance Company, but did not retain the same, nor did he pay any premium thereon, returning said policy upon the receipt of same, thereby having ample notice of the Workmen's Compensation Act. There is evidence tending to show that in the operation of his planing mill, since July 1, 1929, the defendant had employed a varying number of employees, having as high a number as eight at times. The defendant had not, prior to the accident resulting in the death of the deceased, filed notice with the Industrial Commission of his election not to operate under the Act.

Upon all the evidence the Commissioner makes the following

Findings of Fact

1. That on December 31, 1929, the deceased, W. H. Aycock, while in the course of his employment by the defendant, George H. Cooper, received accidental injuries resulting in his death, which injuries arose out of the said employment.

2. That prior to the occurrence of the accident referred to above neither the deceased nor the defendant had filed notice with the Commission of their election not to operate under the Act.

3. That both the deceased, his dependents and personal representative, as well as the defendant, George H. Cooper, are bound by the terms of the Workmen's Compensation Act.

4. That the defendant, George H. Cooper, has failed to provide compensation insurance as required by Section 67 of the Act.

5. That the defendant, George H. Cooper, since July 1, 1929, and at the time of the occurrence of the accident causing the death of the deceased, had five or more employees in the course of his trade, business, or occupation.

6. That the deceased's average weekly wage at the time of the accident was $15.62.

7. That the deceased left the following dependents wholly dependent upon him at the time of the accidental injury; his widow, Mrs. W. H. Aycock, and the following minor children: Virginia, aged 16; Eaton, aged 14; Lilly, aged 12; and William, aged 10.

Upon the following Findings of Fact are based the following

Conclusions of Law

Upon July 1, 1929, all contracts of employment in effect at that time and with certain exceptions those made thereafter, are presumed to have been made or continued subject to the provisions of the Workmen's Compensation Act; and the rights and remedies therein exclude all other rights and remedies for injury or death caused by accidents arising out of and in the course of the employment. See Sections 4, 6, and 11. An employer or an employee has the right of election to operate under the Act, to pay and accept compensation therein provided, or either could elect not to operate thereunder under the conditions prescribed.

The defendant is an employer whose trade, business, or occupation is not specifically exempt from the operation of the Act. He contends, however, that he did not have regularly in his employ five or more employees, and that his operations not being continuous, the employment of the deceased was casual. Therefore, under Section 14 of the Act, he was exempt from the operation of the said Act.

The greater weight of the evidence, however, shows that the defendant's regular business was the operation of a planing mill, and that in connection therewith he operated a repair shop to repair wheels and heads.

The defendant positively testified he had worked but four men in the operation of the planing mill; that he had but four men in his employment. That in addition to the operation of the planer, he testified:

Q. Didn't the planing mill have shop men to repair wheels and heads?
A. Yes, sir.

Q. Mr. Andrews was one of them?
A. Yes, sir.

Q. He works regularly?
A. Yes, sir.

Q. Who was the other?
A. Mr. Marshall, and Mr. Cyrus when he feels able to do a day's work. He has been in my employ since 1902 and he is very old and feeble, and I have often thought one day he wouldn't live out another, and I just kept him because he was faithful and true to me.

There was other evidence showing that the defendant had more than four employees in the operation of the planing mill.

The defendant's business was and had been since 1902, the operation of a planing mill, and since the shop, according to his own statement, was incidental to the operation of the planer, the employees are all in the course of the defendant's business. The evidence further shows that these employees from time to time worked in the shop and then at the planer; in other words, they were interchangeable. The employment of the deceased and his co-employees could not be deemed casual, although the employment was intermittent—no employment is continuous. If continuous employment were one of the requisites to bring an employment within the meaning of the Act, it would be hard to get a contract of employment that would be subject thereto; factories shut down temporarily because of no demand for their products and for other good and sufficient reasons; so we must conclude that the legislature did not contemplate an employment to be continuous in order to bring it within the Act, as they certainly would not enact a statute with such requirements that common knowledge would show to be a nullity under such construction. The defendant's contention that the employment of the deceased and his fellow workers was casual, is not sound. In *Pollank v. Donovan*, 105 Conn., 501-136, A 471, 472, the Supreme Court of Errors of Connecticut said: "'Casual employment' as used in our Act has been construed as meaning occasional or incidental employment; comes without regularity. If the employment be for a definite time as for a day or a month, it is not casual."

In the case of *Almond v. Hathey Concrete Works*, recorded in the advance sheets for January, Chairman Allen of this Commission has defined "casual employment" and "regular business of an employer," which sustains the conclusions herein wth reference to the repair shop being a part of the planing mill operations; also the question of casual employment.

Under Section 39 of the Act, and also under Section 2 (e), the widow and minor children under 18 years of age are presumed to be dependent; and under Section 38, are entitled to 60 per cent of $15.62 per week for a period of 350 weeks, plus funeral expenses not to exceed $200.00, and medical and hospital bills incurred.

Upon the foregoing it is directed that there be issued the following

Award

The defendant, George H. Cooper, is directed to pay to Mrs. W. H. Aycock, widow of the deceased, for her own use and as natural guardian of her minor children—Virginia, Eaton, Lilly, and William—for their own use, compensation at the rate of $9.37 per week, payable weekly, for a period of 350 weeks, plus funeral expenses not to exceed $200.00, and all hospital and medical expenses incurred as the result of the accidental injury.

The defendant will file with the Industrial Commission, within ten days hereof a good and satisfactory bond guaranteeing the weekly payments to be made as herein provided, conditioned upon failure to make such payments the full amount under this award shall become due and collectible from the surety. Failure to provide the aforesaid bond within the time prescribed, this award shall be docketed, as provided in Section 61, for the purposes as therein provided. Further, that upon such failure the defendant will be cited to appear and show cause why the penalties as provided in the Act shall not be enforced.

Concerning the costs of this hearing, each side will pay its own.

[Docket No. 197]

J. J. BRAKEFIELD, Sr., Deceased, MRS. SALLIE MAE BRAKEFIELD, Widow, J. J. BRAKEFIELD, Jr., Son, and MRS. MARY H. BRAKEFIELD, Mother, Plaintiffs, v. H. D. HORTON, Receiver for B. F. WITHERS, Jr., Inc., Employer, and EMPLOYERS MUTUAL LIABILITY INSURANNCE CO., Carrier, Defendants

Filed February 7, 1930

Average Weekly Wage.—Where period of employment too short and basis of pay for workman doing similar work changed during preceding fifty-two weeks affording no basis for comparison and basis adopted is what employee would be earning were it not for the injury.

Dependent.—Where widow has not abandoned nor divorced deceased husband she is entitled to compensation as wholly dependent.

Hearing before T. A. Wilson, Commisioner, at Charlotte, N. C., on January 15, 1930.

Mrs. Sallie Mae Brakefield, Widow, and J. J. Brakefield, Jr., represented by *Mr. David Hamilton*, Attorney at Law, Chester, S. C.

Mrs. Mary H. Brakefield, mother of the deceased, appeared in person.

Defendants represented by *Mr. Chas. W. Bundy*, representing H. D. Horton, Receiver for B. F. Withers, Jr., Inc., and the Employers Mutual Liability Insurance Company.

Opinion by WILSON, Commissioner.

This case came on for hearing to establish two points: (1) dependency; (2) average weekly wages.

It was admitted that the plaintiff was regularly employed by H. D. Horton, Receiver for B. F. Withers, Jr., Inc., on November 25, 1929; that plaintiff was accidentally killed on November 25, 1929, and that said accident arose out of and in the course of his employment.

The evidence tended to show that Sallie Mae Brakefield (nee Thrailkill), widow of the plaintiff, and J. J. Brakefield were married September 13, 1922; that the public records of the Judge of Probate, Chester County, S. C., records the marriage by Rev. George M. Rogers; that one child was born to them January 1, 1927; said child was named Jordan J. Brakefield, Jr., now three years old.

The evidence also shows that the plaintiff failed to support his wife and child for several years prior to his death, and for that reason they were not living together at the time of said accident; that on October 7, 1927, said plaintiff was tried and found guilty of non-support of his wife and child in the Court of Chester County, S. C.; that he was sentenced to six months in prison or to place a bond of $500.00 and pay $25.00 per month to his wife and child; that said plaintiff accepted the sentence in lieu of paying the amount to his wife and child.

The evidence shows that the deceased and widow were never divorced.

At the hearing the deceased's mother, Mrs. Mary H. Brakefield, attempted to show that she was partially dependent upon the deceased. There was insufficient evidence to sustain her claim.

H. D. Horton, Receiver for B. F. Withers, Jr., Inc., testified that the deceased was employed in the capacity of a helper on the trucks and as a potential truck driver; that they usually paid helpers $21.50 per week as an average; some were paid eighteen, twenty-one, twenty-two, twenty-three, and twenty-four dollars per week, but because of the fact that said deceased was not employed as a regular helper, but with the expectation of making a truck driver of him if he qualified, they were paying him the increased wage, which amounted to twenty-five dollars per week; that the regular truck driver received twenty-eight, thirty, and thirty-one dollars per week; that deceased had been working for his company two weeks and one day; that his services had been satisfactory; that the training period runs from four to eight weeks; that early in 1929 they had changed their pay schedule for employees on trucks from so much per week and expenses to so much per week and the employees paid their own expenses.

The defendant carrier attempted to show by the testimony of the widow that said deceased was very irregular in his employment and only worked a portion of the time. Said carrier also attempted to show that said deceased would not have earned an average of twenty-five dollars per week during the twelve months prior to his death.

Upon the evidence in this case, the Commissioner makes the following

Findings of Fact

1. That the deceased and employer defendant had accepted the provisions of the compensation law and the Employers Mutual Liability Insurance Company was the carrier.

2. That Sallie Mae Brakefield, widow, and Jordan J. Brakefield, Jr., son, were wholly dependent upon J. J. Brakefield, Sr., deceased; that said widow was not divorced from said deceased and therefore she was the lawfully wedded wife and Jordan J. Brakefield, Jr., the son of said deceased.

3. That Mrs. Mary H. Brakefield, mother of the deceased, was not partially dependent upon her son, J. J. Brakefield, Sr., the deceased.

4. That the accidental injury and subsequent death of the deceased on November 25, 1929, arose out of and in the course of his employment.

5. That the deceased's average weekly wages were twenty-five dollars.

Conclusions of Law

Section 39 of the compensation law provides that a widow, a widower, and/or a child shall be conclusively presumed to be wholly dependent upon the deceased for support. It also provides that if there is more than one person wholly dependent, the death benefit shall be divided among them; the persons partly dependent, if any, shall receive no part thereof. It is under this section that the Commission awards compensation to the widow and son of said deceased as wholly dependent upon his earnings, even though they did not offer any evidence that they had actually received any money from his wages during the twelve months previous to the deceased's death.

Section 2 (e) provides the method the Industrial Commission shall use in figuring the average weekly wage of a worker. In the above styled case, it is very difficult to arrive at a fair and just method of figuring the compensation due the dependents of said deceased. The testimony of his former employer shows that during the past twelve months a change had been made by the employer in his method of paying the truck drivers, prospective truck drivers, and helpers. Therefore, this eliminates any twelve months period of a fellow employee to be used in lieu of the short period worked by the deceased. Also said employer testified that the training period for prospective truck drivers was from four to eight weeks. This gives the Commission a very short time to use as a comparison between a fellow prospective truck driver and the deceased in an effort to arrive at his average weekly wage. Section 2 (e) does not authorize or empower the Industrial Commission to go outside of the employment of said employer to get a basis for the average weekly wage. The Commission does not know of a trucking company that operates on the same basis as said employer.

In *Kadison v. Gottlieb, et al.*, 233 N. Y. Sup., 485, the Appellate Division of the New York State Supreme Court had this to say: "In computing the amount of the weekly wage the Industrial Commission has calculated her entire earnings during the year immediately preceding her accident, including other employments. This is not permissible." Matter of *Blatchley v. Dairymen's League Coöperative Association*, 225 App. Div., 167, 232,

N. Y. S., 437. "But tips received and the value of her board may be considered." *Sloat v. Rochester Taxicab Co.*, 177 App. Div. 57, 163 N. Y. S., 904; *Hughes v. Belmont Lunch Co.*, 212 App. Div. 847, 207 N. Y. S., 853.

In *Johnson v. Asheville Hosiery Company*, Docket 17, Volume 1, Page 88, the North Carolina Industrial Commission went into great length in analyzing Section 2 (e) relative to average weekly wages. This case was before the Commission upon review. From this decision we quote: "The question before the Commission is not how much the plaintiff earned while working for his father or any other contractor, but how much would the plaintiff have earned per week while in the employment of the Asheville Hosiery Company, 'were it not for the injury'?" See also *Peterson v. Conley Manufacturing Company*, pages 222-5, Court Decisions, Workmen's Compensation Law of Pennsylvania, Volume 8, Houch (1926).

The dependents are entitled to burial expenses under Section 38, not to exceed two hundred dollars. They are also entitled to necessary medical attention incurred during the last illness of deceased as provided for under Section 25.

Award

It is ordered that the defendants pay to Mrs. Sallie Mae Brakefield, widow, and Jordan J. Brakefield, Jr., infant son, compensation at the rate of fifteen dollars per week, payable every four weeks for a period of three hundred and fifty weeks, and funeral expenses not to exceed two hundred dollars; also the necessary medical expenses in connection with this case. Further, that the receipt of Mrs. Sallie Mae Brakefield, widow of said deceased and natural guardian of Jordan J. Brakefield, Jr., shall acquit and fully and completely discharge the defendant of all claims or demands of said infant child.

This, the 7th day of February, 1930.

MARION BOVIS, Plaintiff, v. MANVILLE-JENCKES COMPANY, employer, and UNION INDEMNITY COMPANY, Carrier, Defendants

Filed February 5, 1930

AMPUTATION.—Where finger because of injury interferes with work and employee desires amputation employer shall furnish necessary operation.

Hearing before T. A. WILSON, Commissioner, at Gastonia, N. C., on January 16, 1930.

Plaintiff represented by *C. R. Jones*, Attorney, Lincolnton, N. C.

Defendants represented by *A. W. Fisher, Jr.*, Adjuster for the Union Indemnity Company.

Opinion by WILSON, Commissioner.

The above-styled case was heard to determine (1) if plaintiff refused proper medical attention; (2) the period of temporary total disability; and (3) the percentage of loss of use of fourth finger, left hand.

After a discussion of the first issue, prior to opening the hearing, the defendants withdrew this allegation.

Upon the second issue, Dr. J. F. Gamble testified plaintiff was able to return to work December 26, 1929. The carrier has paid $10.80 compensation, per week, through December 5, 1929.

Upon the third issue, Dr. D. A. Garrison testified plaintiff has fifty per cent use of the finger, but, also, said it should be amputated if the tendon is gone; it will be in the way.

Dr. J. F. Gamble testified that plaintiff has fifty per cent use of said finger; that he had cut off about an inch of the tendon because it was broken off, hanging out, and infected; that if it should interfere with plaintiff's work it should be amputated.

Plaintiff testified that he could do his regular work with the finger cut off, but he cannot with said finger in its present condition.

Plaintiff testified further: "I would like to have it cut off."

Upon the evidence in this case, the Commission makes the following

Findings of Fact

1. That plaintiff and employer have accepted the Compensation Law; that Union Indemnity Company is the carrier.

2. That an agreement for compensation was entered into October 25, 1929, providing for compensation from date of injury, at $10.80 per week; that said compensation was paid from October 15, 1929, through December 5, 1929.

3. That plaintiff is entitled to compensation from December 5 to December 26, 1929, for temporary total disability in addition to that paid.

4. That plaintiff is entitled to fifteen weeks' compensation dating from December 26, 1929, for loss of use of the fourth finger of left hand; that plaintiff is entitled to medical, doctor and hospital cost for amputation of said finger, if he so desires, within one year from date of accident.

5. That the average weekly wages were $18.00.

6. That the medical, doctor and hospital bills shall be paid by the defendants.

Conclusions of Law

The Commission is unable to reconcile the statements made by the two interested doctors that plaintiff has only fifty per cent loss of use of said finger, and that it should be amputated. In view of the fact that plaintiff has requested the amputation of said finger and that the doctors so recommend, the Commission has taken the position that there is total loss of use, and plaintiff is entitled to amputation and its cost, under Section 25, if the finger interferes with his work, as he says. He is entitled to compensation under Section 31 (e) and (t) for same.

This decision is in keeping with the spirit of compensation to restore the injured worker to usefulness and ability to earn a livelihood.

An award shall be made in accordance with these facts.

Defendants will pay the cost.

[Docket No. 82]

WINFRED BRADLEY, Employee, Plaintiff, v. OZARK MILLS, Employer, and LONDON GUARANTEE AND ACCIDENT COMPANY, Carrier, Defendants

Filed February 8, 1930

STEPPING ASIDE.—Where employer condones and encourages doffer boys to leave building during idle periods in the course of the employment and injury to an employee resulting from a fall to the ground while raising himself from a sitting position on a platform outside the building the injury arises out of the employment.

Hearing before T. A. WILSON, Commissioner, at Gastonia, N. C., December 2, 1929.

Plaintiff represented by *Messrs. Woltz & Woltz*, Attorneys at Law, Gastonia, N. C.

Defendants represented by *Mr. P. W. Garland* of Gastonia, and *Mr. V. C. King* of High Point, N. C., Adjuster for the London Accident and Guaranty Company.

Opinion by WILSON, Commissioner.

Summary of Case

The only point at issue in this hearing is, did the accidental injury arise out of plaintiff's employment? Plaintiff fell from either the platform or box car near platform on October 9, 1929, and broke his left arm. There is no question about the injury occurring in the course of his employment. It is admitted that the average weekly wages were $11.00.

Plaintiff was on a platform which extends from the mill to a railroad track. It is used for loading purposes, and is a part of the mill property.

Plaintiff is a doffer boy. There were other doffer boys on the platform and near by playing. This was a period between doffing times. Doffers remove full bobbins and place empty ones on frames.

Plaintiff testified he was sitting on the platform beside a box; that there was about a foot space between box and edge of platform where he was sitting; that when he got up he "either stumped" his "foot on a crack or stumped it on something," that there were big cracks in the platform; that he fell from the platform and broke his left arm, October 9, 1929; that all the doffers go outside between doffing times; that the mill superintendent never did tell them not to go outside; that he was totally disabled four weeks and three days, from October 9 to November 11, 1929; that the section hand would come outside to smoke; that plaintiff was 19 years old the past April.

Frank Belcher, a fellow employee, testified that the section-hand had warned them not to go on the platform; that most of the time they went under the platform; that the section-hand would whistle for them to come in when time to doff; that they still go out; that there was about a foot between the box car and platform.

John Harris, a fellow employee, testified that there were some four or five on the box car; that plaintiff was on the platform; that they all went outside and remained there sometimes fifteen minutes, sometimes two hours; that section hand would come to the door and whistle for them; that he had received no orders to not go outside before the accident; that they now have orders not to go outside; that the last time he saw plaintiff he was about midway of the platform.

Steve Kersey testified that he was a doffer at said mill; that he was on top the box car when the boys threw the ball over; that he went down and got the ball and came back around; that plaintiff "had just fallen off the door"; that he "saw him where he fell off of the door"; that plaintiff was standing with one foot on a rod and a hand on a rod of the box car when he fell; that his foot slipped and he fell beside the platform and box car; that there was a foot space between the box car and the boxes; that Mr. Kincaid, the boss, had "got on" them several times for getting on the box car; that he did not say anything about them going outside if they didn't go on the box car.

Fred Brown, head doffer, testified that plaintiff "had hold of the door with one hand, and had his right foot, I think it was, on the door; the next time I saw him he was getting up off of the ground"; that he had gone out to call the boys in; that he is "supposed to whistle for them."

W. L. Kincaid, superintendent, testified that the doffers always go out of the mill when they doff around; that they have been outside playing baseball this summer; that it was a custom of all mills to let the doffers go out; that he had instructed all not to go on the box cars on the siding; that no one has ever been discharged for violating said orders.

The superintendent further testified: "Of course, we don't allow them to play on the box cars or on the platform if we can help it, but boys are boys; and they slip out and do these things, and it would take forty men to watch them."

Plaintiff's average weekly wage was $11.00. The medical bills have not been paid by the carrier.

Upon the evidence in this case, the Commission makes the following

Findings of Fact

1. That plaintiff and defendant-employer have accepted the Compensatin Law, and the London Guarantee and Accident Company is the carrier.

2. That plaintiff sustained an accidental injury October 9, 1929, while regularly employed by said employer; that said accident arose out of and in the course of his employment; that plaintiff's left arm was broken as a result; that he was totally disabled four weeks and three days from date.

3. That plaintiff's average weekly wages were $11.00; that the medical bills have not been paid by the carrier.

4. That said period of recreation by plaintiff on employer's premises outside of plant, between doffing times, was incidental to his employment.

Conclusions of Law

With the exception of the testimony of Steve Kersey, there were only two witnesses who testified as to the exact position of plaintiff at time of accident. Plaintiff himself testified he was sitting on the platform and had been for ten minutes prior to getting up, that he fell when he got up. There was no testimony submitted to show that he had been playing. Plaintiff, of course, is interested in the outcome of this case. The other, Fred Brown, head doffer, testified that plaintiff had one hand on a rod of said car and a foot on a rod. The next he saw was plaintiff getting up from the ground after the fall. He did not say he actually saw plaintiff fall. The head doffer is interested because he is responsible for the work of the boys even though he could not hire and discharge.

Steve Kersey disqualified his testimony by saying that plaintiff had one hand and one foot on rods of said car. But just prior to this statement he said that he himself was on top of car, the ball had been thrown over; that he went down the opposite side and returned around end of car, and that plaintiff had just fallen; that he saw him where he fell off the door. The position of plaintiff on the ground was not conclusive proof that he had fallen from the car. There was approximately a foot space between the car and the platform.

The exact position of plaintiff should not be the final determining factor in this case, for it is contradictory. Certainly there has been no testimony to show plaintiff was on top of said car or playing with the ball.

The principal question before the Commission is, what right or duty did plaintiff have on the platform, box car or even outside the mill, but remaining on the premises of the employer.

In the above-styled case plaintiff had not walked off and left his job. He had an idle period, as it were, between times to doff. It was customary for the doffer boys to go outside and even play baseball, according to the testimony of the superintendent. Playing outside of plant on employer's premises was incidental to plaintiff's employment; it was a custom; it was a habit of the doffers recognized by the management. If the doffers had not gone outside to play, they would probably have played inside the plant, and interfered with active workers.

There was a verbal rule against playing on the platform and box cars, but it was not rigidly enforced. In fact, several witnesses said they had had no instructions. Even granting plaintiff had one foot and one hand on rods of the car, there was on evidence that he was ever on top, or that he had actually indulged in play, on either the car or platform. Plaintiff was outside the plant because he had no work to perform at this time.

It is quite clear that the accidental injury to plaintiff is within the purview of Section 2 (f) as interpreted by court decisions of other States with similar sections.

Compensation decisions have decided generally that certain accidental injuries sustained on the employer's premises a reasonable time before and after quitting work, during noon hour, and during a recess or idle period, are compensable; but injuries caused by the worker stepping aside and leaving his work to engage in something personal, are not compensable.

In *Von Ette v. Casualty Company of America* (Mass.) 111 N. E., 696, there is a case definitely in point. Von Ette was an employee of a morning newspaper; it was a hot night; he went from the room in which he was working, the room being hot and the work being slack, to the roof of an adjoining building, which was a part of the premises of his employer, he being in need of fresh air, and it being customary to use this roof for that purpose, and that while on this roof, he accidently walked over the edge, or became dizzy, and slipped off into the areaway, and fell to his death. The unprotected place upon the roof where it was found the deceased fell off was twenty-three feet from the foot of the stairway, which he used in getting to the roof. There was evidence that it was common practice to go on the roof. One of the office rules of the employer posted on the premises was as follows:

"No employee shall leave the composing room during working hours except on office business without permission of the man in charge."

The rule was commonly violated, and that it was an incident of the employment of the deceased to go upon the roof.

Compensation was awarded.

An injury to a workman may arise out of and in the course of his employment even if he is not actually working at the time. Sundine's case, 218 Mass., 1, 105 N. E., 433; *Boye v. Columbian Fireproofing Co.*, 182 Mass., 93, 64 N. E., 726; *Blovelt v. Sawyer* (1904), 1 K. B., 271; *Moore v. Manchester Liners*, 3 B. W. C. C., 527; *Humphrey v. Ind. Com.*, 120 N. E., 816; *Steel Sales Corp. v. Ind. Com.*, 127 N. E., 698; *Edmunds v. Owners of Steamship Peterson*, 5 B. W. C. C., 157; *Richards v. Indianapolis Abattoir Co.*, 92 Conn., 274, 102 Atl., 604; *Northwestern Iron Co. v. Ind. Com.*, 160 Wis., 633, 152 N. W., 416.

The defendants did not contend for an exemption or forfeiture under Section 13. It provides that: "The burden of proof shall be upon him who claims an exemption or forfeiture under this section."

There was no evidence of a willful act on the part of said plaintiff. There may have been carelessness, lack of due caution, or thoughtlessness; but there was nothing of a criminal, deliberate or designed nature in the accidental injury. *Smith v. Leslie* (Ind.), 151 N. E., 17; *King v. Empire Collieries Company*, 148 Va., 585, 139 S. E., 478.

Award

Plaintiff is awarded compensation for four and three-sevenths weeks at $7.00 per week; plus necessary medical, hospital and doctor treatment.

[Docket No. 135]

CHARLIE SMITH, Employee, Deceased, et al., Plaintiffs, v. GREEN STREET DRUG COMPANY, Employer, and EMPLOYERS LIABILITY INSURANCE COMPANY, Carrier, Defendants

Filed February 10, 1930

DEPENDENCY.—Parents dependent to the extent of 100 per cent of the deceased minor son's wages entitled to same as persons wholly dependent.

Hearing before J. DEWEY DORSETT, Commissioner, at Greensboro, N. C., January 6, 1930.

Plaintiffs represented by *Messrs. Frazier & Frazier*, Attorneys, Greensboro, N. C.

Defendants represented by *King, Sapp & King*, Attorneys, Greensboro, N. C.

Opinion by DORSETT, Commissioner.

Summary of Case

Charlie Smith, the deceased, was a delivery boy for the Greene Street Drug Company of Greensboro, N. C. He rode a motorcycle in making the deliveries for his employer. On Thursday, August 15, 1929, while making a delivery to one of the customers of his employer, he met with an accident. The deceased either hit an automobile while making a delivery, or an automobile hit the deceased. Because of the accident the deceased was removed to a hospital where he died a few days later.

The defendants admit the death of Charlie Smith. In a report made by the insurance carrier concerning the death of the deceased, this report dated August 29, 1929, we find that the carrier says that the delivery boy was delivering package on a motorcycle; was in a collision with an automobile; and died from injuries received.

Due to the fact that the investigation conducted by the insurance company indicated to the investigator that here was very little, if any, dependency, compensation was refused until a hearing could be had by the Commission.

From the evidence of the employer, which evidence is uncontradicted, it is clear that the accident arose out of and in the course of the employment of the deceased. Dr. Norman Harden attended the deceased before he died, and testified at this hearing. The Doctor says that as a result of an injury received in an automobile collision, that the deceased had a compound comminuted fracture of both bones of the right leg, and that in his opinion the deceased died as a result of the injury. The real cause of his death, however, resulted from gas gangrene, and that the infection, in his opinion, came from contamination where the accident occurred in the street.

Mr. Roy Armfield was probably the first witness to reach the scene of the accident after it occurred; his testimony is that the motorcycle which was being ridden by the delivery boy was under the car; that the negro boy was stretched out on the sidewalk, and that two or three men were trying to hold him and keep him still until the ambulance got there. He further testified that the deceased was covered in blood and that one leg was badly twisted out of shape; that it was broken in two and bent back.

Fanny Smith, the mother of the deceased, says that her boy was sixteen years of age, and that he gave her all of the wages that he earned as a delivery boy for the Greene Street Drug Company. When questioned by the attorneys for the defense concerning the spending money that the deceased used, his mother said that in addition to his regular wages, that her boy received quite a few dollars in tips, and that the tips he received constituted the boy's spending money. The mother was emphatic that she was dependent upon the wages earned by her son to support herself and family, and since the death of her son she has been compelled to go to work. The mother testified that the boy was earning $15.00 per week.

From all the evidence it seems that the deceased was paid $12.50 per week by his employer for about one-half the time while employed before his death, and that for the rest of the period of employment the deceased was paid $15.00 per week.

From all the evidence the Commissioner arrives at the following

Findings of Fact

1. The parties, plaintiff and defendant, are bound by the provisions of the North Carolina Workmen's Compensation Law. The Employers' Liability Insurance Company is the insurance carrier and is intervening as a party defendant.

2. The average weekly wage was $13.75.

3. The accident resulting in the death of the deceased arose out of and in the course of his employment.

4. The deceased was a boy about the age of 16 years, and at the time of his death was unmarried. His father, Charles Smith, and his mother, Fanny Smith, at the time of the death of the deceased were dependent upon the earnings of the deceased for support of themselves and family.

5. The deceased paid over to his mother for her use in supporting the family his entire earnings.

Conclusions of Law

This Commission in other cases coming before it has undertaken to define what the terms "arising out of" and "in the course of" mean, and in the case of *Southern v. Morehead Cotton Mills Co.*, stated that the words "out of" point to the origin or cause of the injury. The words "in the course of to the place and circumstances under which the accident or injury takes place. The former words are descriptive of the character or quality of the accident; the latter words relate to the circumstances under which the accident of that character or quality takes place. The character or quality of that accident as conveyed by the words "out of" involves the idea that the accident is in some sense due to the employment and must result from a risk reasonably incident to the employment. In the instant case we think there can be no doubt that the accident causing the death of the deceased arose out of and in the course of his employment. The medical testimony is clear that the death of the deceased was caused by the accident; that he died from an infection, the germ causing the said infection, in the opinion of the doctor who testified, coming from the street where the deceased was injured.

The question of dependency and the amount of compensation due will be considered together; in the instant case the evidence is clear and uncontradicted that the parents were dependent upon the earnings of the deceased for support. The evidence is that he deceased contributed or turned over to his mother his entire weekly wage. The presumption is that his mother was the treasurer; she paid the bills and ran the home. The parents of the deceased contend that they are entitled to full compensation, or 60 per cent of $13.75 per week for a period of three hundred and fifty weeks, to have all the hospital and medical bills paid, and to receive funeral expenses not to exceed $200.00 as provided by the law.

We are again faced with questions involving the dependency of a mother on the earnings of a minor child for the support of herself and family. The Workmen's Compensation Act now in force in this State makes certain provisions for dependents but does not undertake to define dependency other than to say that a widow, a widower, and/or a child shall be conclusively presumed to be wholly dependent for support upon the earnings of the deceased for support. The evidence is that the deceased contributed or turned shall be determined in accordance with the facts as the facts may be at the time of the accident. The Appellate Court of the State of Indiana in the case of Carroll, 116 N. E., 844, has this to say: "To confine the inquiry to the question of whether the family of the deceased workman could have supported life without any contribution from him, or whether such contributions were absolutely necessary in order that the family might reasonably be maintained, is not a fair test of dependency; but, the inquiry should include the question of whether contributions from the workman were looked to, depended or relied upon in whole or in part by the family for means of support.

Following the rule thus laid down, it seems clear to this Commissioner that the word "dependent" as used in the North Carolina Workmen's Compensation Act should be broad enough to include the reasonable needs of a parent in the proper support of himself and his dependent family. The matter of whether or not an applicant in any given case is entitled to compensation as a dependent must necessarily be determined from the circumstances as disclosed by the evidence. In the instant case the evidence is clear that the weekly contributions made by the deceased son consisted of all that he earned, and that the said contributions to his mother were used as required by that mother for the support of herself and family.

Section 38 specifies the amount of compensation in the case of death to be paid to those dependent upon the deceased. That Section says that if an employee leaves dependents only partly dependent upon his earnings for support at time of the injury, the weekly compensation to be paid shall equal the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of his injury. Under the Act we believe that the dependent parent should receive for a period of three hundred and fifty weeks that proportion of what she would have received had she been wholly dependent as to what she actually received from her deceased son bears to her son's annual earnings at the time of his death. The evidence is that the mother was receiving all of her deceased son's earnings at the time of his death, or 100 per cent thereof; it necessarily follows, then, that she is entitled to receive 100 per cent of what she would have received had she been wholly dependent. In other words, there is no difference as we see it, in the amount a total dependent and a partial dependent is entitled to receive, under such Section, where such dependent receives all of the earnings of the deceased employee.

The following award is therefore made:

Award

The defendants are directed to pay to Charles Smith and Fanny Smith, the parents of the deceased, compensation at the rate of 60 per cent of $13.75, or $8.25 per week, for a period of 350 weeks; to pay funeral expenses not to exceed $200.00, and any medical and hospital expenses incurred.

Concerning the costs of this proceeding, each side will pay its own.

[Docket No. 121]

SETH MOREHEAD, MRS. SETH MOREHEAD, LAWRENCE MOREHEAD, GUY MOREHEAD, Deceased, Employee, Plaintiff, v. SOUTHERN BELL TELEPHONE AND TELEGRAPH CO., Self-insurer, Defendant

Filed February 12, 1930

Personal Representative.—Deceased leaving no dependents, the personal representative entitled to same compensation as persons wholly dependent.

Hearing before J. Dewey Dorsett, Commissioner, January 8, 1930, at Gastonia, N. C.

Plaintiff represented by *Messrs. Quinn, Hamrick & Harris*, Attorneys of Shelby, N. C.

Defendants represented by *Mr. L. D. Sharp* of Atlanta, Ga.

Opinion by Dorsett, Commissioner.

Statement of the Case

Guy Morehead was regularly employed by the Southern Bell Telephone and Telegraph Company as a lineman at an average weekly wage of $23.94. On October 4, while performing his regular duties for his employer, in endeavoring to clear a toll line of some debris which had gotten on the water during high water, the boat in which he was riding over-turned resulting in his death by drowning. Mrs. Seth Morehead, mother of the deceased, has filed a claim for compensation. The defendants do not deny liability for compensation, but they state that he apparently had no dependents, since they have evidence showing that he had not contributed regularly to the support of his parents.

At the hearing the parents of the deceased attempted to prove that they were dependent, while the defendants endeavored to show that from all the information they had and had been able to secure the deceased was not contributing regularly to the support of any dependent relative.

Seth Morehead on the 8th day of February, 1930, filed with this Commission a certified copy of letters of administration issued by the Clerk of the Superior Court of Cleveland County.

The evidence shows that from time to time the parents of the deceased received certain sums of money from him. The mother, Mrs. Seth Morehead, testified that they were dependent upon him for support, but she was not able to say just how much money they had received from their deceased son during the past twelve months; she said that when they needed money they would write to him, and he would send it to them—sometimes $25 and sometimes $50. The deceased was living away from home, he was unmarried, and the evidence is that he had not contributed anything to his parents for several months. From all the evidence the Commissioner makes the following

Findings of Fact

1. The parties plaintiff and defendant are bound by the provisions of the North Carolina Workmen's Compensation Act, neither having rejected the same.

2. The defendant employer is a self-insurer, and has complied with the provisions of the Workmen's Compensation Act whereby it is allowed to carry its own risk.

3. The deceased was an unmarried young man under twenty-one years of age, and while regularly employed by the defendant was, on October 4, drowned, the accident resulting in the drowning, arising out of and in the course of his employment.

4. The average weekly wage of the deceased was $23.94.

5. The deceased died leaving no dependents.

6. The personal representative, Seth Morehead, is entitled to receive compensation due because of the accidental death of the deceased.

Conclusions of Law

It is true that there is in the record evidence that the deceased contributed certain sums of money from time to time to his parents, and that his mother testified that they were dependent upon the earnings of the deceased for support. Under the evidence, however, the Commissioner is unable to find that dependency actually existed. As a rule, to which there are exceptions, the fact that contributions to support have been made is an essential element of a state of dependency within the Workmen's Compensation Act. "A dependent within the Workmen's Compensation Act is one who looks to another for support and maintenance, one who is in fact dependent, one who relies, for the reasonable necessities of life, on another, and the question is not whether the alleged dependents could have supported life without any contributions from the deceased employee, or whether his contributions were absolutely necessary to the reasonable maintenance of the alleged dependents, but rather whether his contributions were looked to or depended or relied on in whole or in part for means of reasonable support. *In re Carroll,* 116 N. E., 844-846, 65 Ind. App. Div., 146.

The Court, in *Richardson Sand Co. v. Industrial Commission,* 129 N. E., 751-752, says: "The test of dependency within the Workmen's Compensation Act is whether the contributions were relied on by the dependent for his means of living, judged by the position in life he occupies, or whether the dependent was to a substantial degree supported by the deceased, and not whether the claimant would have been without the necessities of life in the absence of such contributions.

In *Atwood v. Connecticut Light and Power Company,* 95 Conn., 669, the court says: "The test as to dependency within the Workmen's Compensation Act is whether the employee's contributions were relied upon by the dependent for his or her means of living, the class and position in life of the dependent being considered, and the fact that earnings were turned into a family fund, and used as one of the sources of support of the family of the employee does not prove that they were relied upon for living expenses."

Again in *Rock Island Bridge & Iron Works v. The Industrial Commission,* 122 N. E., 830, the Court says: "In law a dependent is one who is sustained by another or relies for support upon the aid of another, who looks to another for support, and relies on another for the reasonable necessaries consistent with the dependent's position in life.

In the instant case the evidence is not convincing that the parents of the deceased looked to and relied on contributions made by their deceased son for the necessaries of life, or that they depended upon his contributions for support, and in the absence of such poof that they were dependent, the Commission is compelled to hold that the personal representative is entitled to the compensation due.

Guy Morehead leaving no dependents, and the record disclosing the fact that the personal representative, Seth Morehead, had properly qualified as the administrator of the estate in Cleveland County, N. C., section 40 of the act provides: "If the deceased employee leaves no dependents, the employer shall pay to the personal representative of the deceased the commuted amount provided for in Section 38 of this act, less the burial expenses which shall be deducted therefrom." This Commission in *Freeman v. B. & N. Motor Company and the Maryland Casualty Co.,* Docket No. 216, has held that the personal representative, where there are no dependents is entitled to recover under section 38 the same amount that those wholly dependent would be entitled to recover, commuted and paid in a lump sum as provided in Section 44, less, of course, burial expenses as provided in Section 40.

Award

The Defendant Southern Bell Telephone and Telegraph Co. is directed to pay to Seth Morehead, personal representative administering on the estate of Guy Morehead, the deceased, the commuted amount of 60 per cent of $23.94 or $14.36 for 350 weeks, less burial expenses, which shall be deducted therefrom. Any medical and hospital bills will be paid by the defendant. Concerning the cost of this hearing, each party will pay its own.

[Docket No. 45]

WALTER F. GRIFFIN, Deceased, Employee, W. B. GRIFFIN, SELMA GRIFFIN, JOHN B. GRIFFIN, THOMAS S. GRIFFIN, Plaintiffs v. McLELLAN STORES, Employer, and AMERICAN EMPLOYERS INSURANCE CO., Carrier, Defendants

Filed February 7, 1930

Dependents.—Where parents are dependent upon minor son's earnings for partial support, the cost of maintaining the minor should not be considered in computing the degree of dependency.

Review before the full Commission at Raleigh, N. C., January 20, 1930.

Plaintiffs represented by *Fisher & Jones*, Attorneys, High Point, N. C.
Defendants represented by *Mr. A. B. Droher*, Adjuster, Greensboro, N. C.

Opinion for the full Commission by Wilson, Commissioner.

This case was reviewed by the full Commission on January 20, 1930, upon application of the defendants from an award made by Commissioner Dorsett on December 12, 1929.

The defendant claims that the amount allowed Mrs. W. B. Griffin, partial dependent, mother of the deceased, was not in accordance with the evidence as submitted. A careful review of the evidence taken justified the findings made by the hearing Commissioner, and the Commission is in accord with his award.

In affirming the Commissioner's award, the Commission cites the following case: *In re Peters* (Indiana), 116 N. E., 848. In this case the facts show that the father of the deceased was making fifteen dollars per week, which went into a family fund and was used for the support of his family; that the son was a minor earning $12.75 per week, and likewise his earnings were placed in the family fund. The statement of facts shows that out of the family fund, composed of the earnings of both father and son, the father supported the whole family, providing a home, clothes, and food for the deceased son, at probable weekly cost of $4.00. The question before the Court was: Shall the cost of the maintenance of such deceased son be deducted from the earnings, contributed by him to his father for the support of his dependent family, in determining the amount of compensation to which such father is entitled as a partial dependent? It was held that the cost of the maintenance of a contributing minor son should not be considered in determining the amount of compensation to which a dependent father is entitled. See *Bloomington-Bedford Stove Co. v. Phillips* (Indiana), 116 N. E., 850. Also *In re Buckley*, 218 Mass., 354, 105 N. E., 974, Ann. Cas. 1918B, 474 and notes, 480; *In re Carter*, 221 Mass., 105, 108 N. E., 911; *In case of Caliendo*, 219 Mass., 498, 107 N. E., 370.

It is contended that a proper inquiry to be made, where a parent makes application for compensation by reason of being deprived of contributions from the earnings of a minor son, is whether such son was a financial asset to such parent; that the mere fact that the son's earnings entered into the common family fund is not material, unless those earnings exceeded the cost of his maintenance. This contention finds support in certain cases under the English Workmen's Compensation Act, where it is provided that the compensation shall be "proportionate to the injury of said dependents," but it has not met with approval in this country under acts similar to the one by which we are governed. This identical question was involved in the case of *Mahoney v. Gamble-Desmond Co.*, 90 Conn., 255, on page 258; 96 Atl., 1025, on page 1028, decided by the Supreme Court of Connecticut, in which the court said:

"We are not, therefore, required in this case to strike a balance between the boy's earnings and the cost of his maintenance, with a view to ascertaining whether his death was a financial injury to the father. We are only to determine whether at the time of the injury the father was dependent upon the boy's earnings within the meaning of the act. As to this we think there can be no doubt. It was the father's duty to support the boy, and it was his right to receive the boy's wages. The boy did not, as the respondent argues, give to his father his pay envelope in exchange for maintenance. Nor did the father maintain the boy in exchange for his wages. The boy's wages belonged to the father. Whatever earnings the boy turned over to his father were used by the father in discharging his legal obligation to support his family; and as the father had no other income at the time of the injury, he was plainly dependent on the boy's earnings for his means of living."

The cases of *Grove v. Royal Indemnity Co.*, 223 Mass., 187, 111 N. E., 702, and *In re Murphy*, 218 Mass., 278, 105 N. E., 635, are to the same effect.

The opinion of the hearing Commissioner is, therefore, affirmed by the full Commission and is hereby adopted as the opinion of the Commission.

Ordered at Raleigh, N. C., February 7, 1930.

[Docket No. 152]

R. F. HEPLER, Deceased, Employee, et al., Plaintiffs, v. FORSYTH FURNITURE LINES, Employer, and LIBERTY MUTUAL INSURANCE CO., Carrier, Defendants

Filed February 13, 1930

DISEASE.—Where death is due to apoplexy and expert evidence fails to show a causal connection of the disease and a fall occurring shortly prior thereto, death held result of the disease and not an accident. To be compensable the employment must set in motion approximate cause that can be traced to be the result of an injury by accident and not to any other agency.

Hearing before J. Dewey Dorsett, Commissioner, at Winston-Salem, N. C., January 6, 1930.

Plaintiff represented by *Messrs. Wallace & Wall* of Winston-Salem, N. C.

Defendant insurance carrier represented by *Mr. J. B. Everett*, Adjuster.

Opinion by Dorsett, Commissioner.

Statement of the Case

Mrs. Martha Hepler, widow of Robert P. Hepler, deceased, filed this petition with the Commission against the Forsyth Furniture Lines, employer, and the Liberty Mutual Insurance Co., insurance carrier, for compensation on account of the death of her husband, R. P. Hepler, on October 23, 1929.

The deceased, who was just an ordinary laborer, was employed by the defendant employer for several years. On the date of the injury which resulted in the death of Hepler, he was asked by his foreman, one Jap Dorse, to go with him to a certain room of the defendant's factory for the purpose of starting up some machinery that had not been used for some few weeks. It seems that Jap Dorse was operating the switch that controlled the motor while the deceased was to put a certain belt on a counter shaft some several feet distance from Mr. Dorse. The evidence is to the effect that due to machinery and other obstructions, Mr. Dorse could not see Helpler from where the switch was being operated, and that Helpler was to give the signal indicating when he would be ready for the switch to be turned on starting the motor to the machine where Helpler was working. The signal was given once and the motor was started; the deceased, however, was not successful in getting the belt on, and the motor was stopped. Dorse waited some few minutes for another signal, and failing to get the signal, went to investigate the matter and found the deceased in a helpless and unconscious condition on the floor of the factory a few feet from where he was attempting to put the belt on the counter shaft.

It is the contention of the defendants that the deceased died as a result of natural causes, and not on account of anything which he did in the execution of his work. The contention of the plaintiff is that while attempting to put the belt on the counter shaft that the belt in some manner must have struck him a blow that resulted in his unconscious condition leading to his death. The plaintiff's contention is that he was executing enough force in putting the belt on the counter shaft to have strained himself; that he was a man of high blood pressure; that he was struck by the belt causing him to fall and that the fall hastened his death; that he breathed after he fell and that his heart beat, all of which indicated that he did not die from heart failure.

There is no testimony in the record from anybody who saw the belt strike the deceased, or who saw the deceased fall, and the evidence is that Jap

Dorse was the first man who reached him and that he found him in a helpless and unconscious condition lying on the floor a few steps from where he was supposed to have been putting the belt on the counter shaft.

Dr. H. F. Munt testified that he examined the deceased within ten minutes after he was called by the employer to come to his place of business to attend the deceased, and that he examined him within ten or fifteen minutes after the deceased was discovered in his unconscious condition. The Doctor testified that after assisting in getting the deceased on a stretcher and calling an ambulance, that he gave him a thorough examination; that he went over his head and could not find any scar or anything at all about his head; that he examined his neck and found nothing wrong there; that he felt over his bones and found nothing there. He further testified that the deceased could not move his right side, his right arm, or his right leg, but he could move his left arm and his left leg; and there was no doubt in his (the Doctor's) mind but that the deceased suffered a stroke of apoplexy, and he ordered that the deceased to be taken home. Upon the arrival home, Dr. Munt asked who the family physician was and was informed that Dr. Wright was the Doctor who had been attending the family. Dr. Munt had Dr. Wright called, and the two of them examined the deceased carefully. They started at his head and went all over him; his clothes were off. The evidence is that no bruises could be found. Both doctors testified that the deceased had paralysis of the right hand and leg; the other was moving all right. The left pupil was a little dilated, the right was normal. He was just blowing; he was perfectly unconscious like you would expect in a man who had trouble in his brain. Dr. Wright, the family physician, testified that he found no bruises, or marks of any kind on the head or body of the deceased, and that he requested the undertaker to look him over and see if he could find any marks, and that the undertaker found none whatever.

Dr. T. C. Redfern was summoned and testified in the case at the instance of the plaintiff. He was asked that if a man had high blood pressure and should be given a hard blow about the head would such a blow contribute to apoplexy, in his opinion. His answer was that that would have to be a qualified answer; it might and it might not; I should think it probably would; it would increase the likelihood anyway. The Doctor was further asked if such a blow could have any effect in causing apoplexy, and his answer was "no." The Doctor was further asked if apoplexy always appeared because of heart trouble or high blood pressure only, or could there be an external contributing cause such as a blow or shock, etc. His answer was that he thought if we had a claimant with a perfectly healthy set of blood vessels in his brain, who claimed that injury began it, he would think it was impossible for him to have apoplexy as a result of a blow per se. The blow would have to be so hard that it would smash the skull pretty badly. He was further asked if he thought it possible for one to be struck a rather hard blow about the head with an ordinary leather or canvas belt and such a blow not leave any visible mark. His answer was that he thought it would depend entirely on the force of the blow as to whether or not it would leave a visible mark, and that he did not recall ever seeing anybody who had been hit with a belt. On cross-examination, Dr. Redfern said that it seemed to him that a blow sufficient to cause apoplexy would leave a mark, and that there really would be evidence of trauma, and that there would be some bruise or other. Upon being asked the direct question of whether in the absence of a bruise he would be willing to state definitely that the blow which the deceased had received on the head had caused the trouble, he answered that not knowing anything more about it than he did, he would not.

From all the evidence, the Commissioner makes the following

Findings of Fact

1. The parties, plaintiff and defendant, are bound by the provisions of the North Carolina Workmen's Compensation Act, neither having rejected the same. The Liberty Mutual Insurance Company is the insurance carrier and is intervening as a party defendant.
2. The average weekly wage of the deceased was $20.63.
3. The injury resulting in the death of the deceased was not an accidental one as contemplated by the North Carolina Workmen's Compensation Act, arising out of and in the course of his employment.
4. The deceased died from natural causes.

Conclusions of Law

The burden of proof is upon the plaintiff to prove by a preponderance of the evidence, and certainly by the greater weight of it, that the death was the result of an accident which occurred in the course of and arose out of the employment. If a workman dies from a pre-existing disease which is accelerated under circumstances which can be said to be accidental, his death is the result of accidental injuries. The plaintiff in the instant case has failed to sustain the burden of proof in establishing, in the first place, that the deceased met with an accident as contemplated by the North Carolina Workmen's Compensation Law. "The liability of an employer under the Compensation Act cannot be based on a choice between two views equally compatible with the evidence, but the liability must be based upon facts established by the evidence; and where the cause of the injury or death is equally consistent with an accident, and with no accident, compensation will be denied." *Ryan v. Industrial Commission*, 329 Ill., 209, 160 N. E., 353.

The ultimate purpose of the Workmen's Compensation Act is to treat the cost of personal injuries incidental to the employment as a part of the cost of the business; it does not afford compensation for injuries or misfortunes which are merely contemporaneous with the employment or collateral to it. The essential connecting link of direct causal connection between the injury and the employment must be established before the Act becomes operative. The injury or death must be the result of the employment and flow from it as the inducing proximate cause. The rational mind must be able to trace the result of injury to a proximate cause, set in motion by the employment, and not by any other agency or there can be no recovery.

In the instant case the plaintiff has not established her claim by clear and satisfactory evidence. Clear and satisfactory evidence is evidence which convinces the mind or conscience of the person or body hearing the case of the truth of the contentions. If it fails to convince the trier that the effect or result claimed really existed or happened, then a finding to that effect cannot be made; in other words, the party alleging such fact or result has failed to discharge the burden of proof. It is not enough that evidence has been offered which tends to prove the fact or result; it is not proved until the trier is convinced that the fact or effect actually existed.

For the reasons set forth above, it is directed that an award be made denying compensation and dismissing the case. Each party will pay its own costs.

[Docket No. 158]

W. C. STEGALL, Employee, Plaintiff, v. WADE MANUFACTURING CO., and AMERICAN MUTUAL LIABILITY INSURANCE CO., Carrier, Defendants

Filed February 14, 1930

DISEASE.—Osteo-arthritis where not the result of an injury by accident is not compensable.

Hearing before J. DEWEY DORSETT, at Charlotte, N. C., January 7, 1930.

Plaintiff represented by *Mr. W. V. Howard*, Attorney of Charlotte, N. C.
Defendant represented by *Mr. J. Lawrence Jones*, Attorney of Charlotte, N. C.

Opinion by DORSETT, Commissioner.

Statement of the Case

On the 27th or 28th of September, 1929, some time between 10:00 a.m. and 12:00 o'clock, W. C. Stegall, the plaintiff, an employee of the Wade Manufacturing Company, felt his right wrist "give way." At the hearing the plaintiff testified that this occurred while lifting a table top which he estimated weighed between 75 and 80 pounds, but which Mr. A. B. Morgan, the cabinet room foreman, said actually weighed 49 lbs.

The plaintiff's family physician testified that he first saw the plaintiff with respect to the wrist alleged to have been injured on either the 27th or 28th of September, at which time the affected hand was badly swollen and inflamed, and that he made a second examination about two weeks later at which time he found practically the same condition except that all the tissues had hardened and osseous tissue was being destroyed; that the inflammation in the affected hand was being caused by some germ, probably by either the streptococcus, the staphylococcus or the diplococcus, in the blood prior to the alleged injury; that the germ probably became active by reason of lowered vitality, as from an injury; that at the time of the first examination there was no external evidence of a contusion or bruise, or of an open place or cut; that any kind of an injury, a strain, would so lower the vitality as to cause the germ to become active resulting in a condition known as arthritis.

Dr. E. R. Hipp testified that he examined the plaintiff on October 25, 1929, at which time he found the plaintiff's right wrist and hand swollen and very tender; that an X-Ray examination showed evidence of osteoarthritis;that the carpal bones were rarefied, a condition which must have required six or eight weeks to develop; that this infection is blood-borne; that in his opinion the alleged injury was not sufficient to have produced the condition as it was not sufficient to influence the circulation of the blood; that there are many cases of osteoarthritis which have no history of an injury. Dr. Hipp was positive in stating that an injury of the nature alleged to have been sustained by the plaintiff could not have so lowered the plaintiff's vitality as to have resulted in the condition he found, that only a crushing injury by a direct blow would start up such an active infection; that at the time of his examination the plaintiff gave him a history of having had rheumatism several years ago. The plaintiff himself testified that two or three years ago he had been treated for sciatica, and that a short time prior to his injury he had been out two days with a bad cold. The testimony of witnesses with respect to what the plaintiff said about having hurt his wrist is conflicting. Asked the question, "Did you ever say to Mr. Webb and the young lady in the office that you didn't consider that the table top had anything to do with it?" The plaintiff replied, "I said I couldn't tell whether it did or not. That's where the hurting started."

From all the evidence the Commissioner arrives at the following

Findings of Fact

1. That the plaintiff has not established the fact of an "accident" within the meaning of Section 2 (f) or the North Carolina Workmen's Compensation Act.

2. That the swollen condition of the plaintiff's wrist and hand resulted from a lowering of the plaintiff's vitality from some cause not clearly indicated by the evidence.

Conclusions of Law

The burden was upon the plaintiff to prove an accident arising out of and in the course of his employment; this he has failed to do.

Having failed to prove an injury by accident, the plaintiff is not entitled to recover. Section 2 (f) of the North Carolina Workmen's Compensation Act.

For the reasons given, the Commissioner directs that an award be issued dismissing the claim; and further, that each side pay its own costs.

[Docket No. 213]

GRAHAM PIERCY, Employee, Plaintiff, v. HENRIETTA MILLS, Employer, U. S. CASUALTY CO., Carrier, Defendants

Filed February 21, 1930

STEPPING ASIDE.—Employee voluntarily abandoning or stepping aside from employment and receiving injuries not entitled to compensation.

This hearing was before MATT H. ALLEN, Chairman, held in the office Clerk Superior Court, at Shelby, N. C., at 3 p.m. on January 24, 1930.

Plaintiff represented by *Oscar J. Mooneyham*, Attorney, Henrietta, N. C. Defendants represented by *Ralph V. Kidd*, Attorney, Claim Adjuster, U. S. Casualty Company, Charlotte, N. C.

Opinion by ALLEN, Chairman.

Findings

This was a claim from Rutherford County, held by consent of both parties, plaintiff and defendant, at Shelby, N. C., on January 24, 1930.

It appears from the evidence that the claimant, who at the time of his injury was sixteen years of age, was employed by the defendant, Henrietta Mills, as a spinner; and that on the night of October 15 the plaintiff left the point or place of his employment to eat his lunch; and upon returning, and at the opposite end of the room from where he worked, he stopped beside the bobbin cleaning machine, which was covered by a lid or hood; that he attempted to let the lid down and his hand was caught in the machine, resulting in the laceration of the second and ring fingers of the left hand, causing a permanent loss of use of the two fingers of seventy-five per cent. It further appears from the evidence that the claimant was a night hand, drawing wages at the rate of $14.75 per week.

Conclusions of Law

Upon the admitted evidence the Commission concludes as a matter of law that the injury to the plaintiff was resulted while outside the scope of his employment, without the employer's consent, and not in an emergency, and therefore not compensable.

Counsel for the claimant contended that the North Carolina Workmen's Compensation Act only provides for absolute forfeiture of compensation, in cases where the injury or death is occasioned either by intoxication, or the willful intention of the employee to injury or kill himself or another, and that if the employee willfully violated any rule or reguation of the employer, such violation would at most have the effect of merely reducing his compensation ten per cent, as provided by Section 13 of the Act.

It was contended by the claimant that under the common law he would have a right of action if the employer failed and neglected to warn him of the dangers of the machine at which he was injured. It was further contended that the mother of plaintiff would also have a right of action at common law for the loss of services due to this accident, if it resulted from the failure of the employer to warn the claimant of the dangers of this and other machines around which he was working.

Section 11 of the Compensation Act provides that "the rights and remedies herein granted to an employee where he and his employer have accepted the provisions of this act, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employees, his personal representative, parents, dependents or next in kin, as against employer at common law, or otherwise, on account of such injury, loss of service, or death."

The present case is in many respects similar to the case of *James Smith v. Neuse Veneer and Box Company and the Maryland Casualty Company,* filed February, 1930. In that case the claimant was a minor fifteen years and ten months of age, employed by the defendant company to feed the dry kiln, and on the date of the injury he left the place of his employment and went to a buzz saw, about forty-five feet distant from his place of work and undertook to cut from a board a panel for a window light at his home, and in so doing he lost his forefinger and the partial use of the three fingers next to the forefinger. In this case the Commissioner said "employment in which the plaintiff was engaged was lawful for one of his age and the employment not being in violation of any statute the Commission must deal with the employment upon the same basis as if the minor were of age."

In the Smith case *supra*, the Commissioner suggested that if the master had failed in its duty to the claimant, in explaining to him fully the hazards and dangers connected with the business, and failed to use ordinary care to protect him from risks which he could not properly appreciate, the master was subject to the same liability as if the minor was not a servant or employee, and that he might have a remedy at common law, based upon a duty to him as a licensee, citing *Ensley v. Lumber Company,* 165 N. C., 687, and *Roxana Pet. Co. v. Cope,* 132 Okla., 152, 60 A. L. R., 837.

Sullivan's case, Supreme Jud. Ct. (Maine), decided Oct. 18, 1929, 147 H. E. L., 431, the claimant, who was eighteen years of age, was employed as general helper in a woolen mill, his duty being to carry cloth from one place to another, and to assist any of the operators who might need him. At the time of the accident he walked over to a shearing machine, and as he stood waiting he reached out his hand and touched the blanket that was moving just out of curiosity. His hand was carried quickly to the knives and four fingers and part of the thumb were severed. Held,—that the injury was a result of plaintiff's own voluntary act, done solely out of curiosity, entirely independent of any duty required to be performed, and consequently not in the course of employment, and therefore not arising out of the employment.

The Commissions and Courts have almost uniformly held, where an employee voluntarily and without necessity abandons his employment or steps aside from the line of duty, he suspends the relation of employer and employee, and puts himself in the position of a stranger or licensee.

(*Patterson v. Lumber Company,* 145 N. C., 42; *Shoffler v. Lehigh Valley Coal Co.* (Pa.), 139 Atl., 192.)

Award

It is ordered that an award issue denying compensation.

[Docket No. 161]

JAMES SMITH, Employee, Plaintiff, v. NEUSE VENEER AND BOX CO., Employer, and MARYLAND CASUALTY CO., Carrier, Defendants

Filed February 20, 1930

STEPPING ASIDE FROM EMPLOYMENT.—Where a servant voluntarily departs from assigned duties, or leaves the work to do something for which he was not engaged there is no contractual relation and, the employment is temporarily suspended. Injuries sustained where employment voluntarily abandoned not compensable.

Hearing before MATT H. ALLEN, Chairman, at New Bern, N. C., on January 9, 1930.

Plaintiff represented by *Ward & Ward*, Attorneys. New Bern, N. C.
Defendant represented by *Moore & Dunn*, Attorneys, New Bern, N. C.

Opinion by ALLEN, Chairman.

Findings

This was a claim upon Craven County for compensation to plaintiff, who at the time of his injury was a minor, fifteen years and ten months of age.

It appears from the evidence that the claimant, on September 2, 1929, was employed by the Neuse Veneer and Box Company to feed the dry kiln at a salary of $2.00 per day, and that his duties required him to stand upon a platform during the performance of his work; that there was located within about forty-five feet of the dry kiln a buzz saw, which was covered by a hood; that on the date of the injury the claimant left the platform upon which he was working, and walked over to the buzz saw and picked up a board and undertook to cut from it a piece to fit a window light at his home; that in his attempt to cut the board his forefinger was mutilated, and his thumb and the third and fourth fingers were badly lacerated, with the result that his forefinger was amputated, and there is a permanent limitation of the use of the joints of the three fingers next to the forefinger.

The accident occurred on Labor Day, and it appears from the evidence that a number of the employees, including the operator of this particular saw, were taking holiday.

The evidence is conflicting upon the question as to whether or not the machine was running at the time the claimant stepped aside to cut the board. The plaintiff testified that it was running, while other witnesses testified that the plaintiff started the machine.

There was evidence tending to prove that other employees had used this machine at times when the regular operator was not present, and no evidence that the plaintiff had ever been warned of the dangers of this or other machines in the plant.

Conclusions of Law

Upon all of the evidence the Commissioner concludes as a matter of law that the injury to the claimant was received while working outside the scope of his employment without the employer's consent, and not in an emergency at which time the relation of master and servant was suspended, and therefore not compensable.

The employment in which the claimant was engaged was lawful for one of his age. A Statute which is violated by employment of a minor must be one which forbids his employment. There is no provision of the Compensation Act, or the Statute law of this State, which forbids the employment of a minor fifteen years of age. The employment of this minor not being in violation of any statute, the Commission must deal with the employment upon the same basis as if he were of age.

The Industrial Commission can only deal with the rights of the parties, based upon the contract of employment, and while the relation of master and servant exists, and its jurisdiction is limited in this respect.

If the master has failed in its duty to this claimant of explaining to him fully the hazards and dangers connected with the business, and failed to use ordinary care to protect him from risks, which he could not properly appreciate, the master is subject to the same liability as if the child were not a servant or employee, and the claimant may have a remedy at common law based upon a duty to him as a licensee. (See *Ensley v. Lumber Company*, 165 N. C., 687; *Roxana Pet. Co. v. Cope*, 132 Okla., 152, 60 A. L. R., 837.)

The ultimate purpose of the Workmen's Compensation Act is to treat the cost of personal injuries incidental to the employment as a part of the cost of the business. It does not afford compensation for injuries or misfortunes which are merely contemporaneous or coincident with the employment, or collateral to it. The essential connecting link of direct causal connection between the injury and the employment must be established before the Act becomes operative. The accident must arise out of and in the course of the employment, and the injury must be the result of the employment, and flow from it as the inducing proximate cause.

Notice must be taken that a factory such as the one operated by the defendant employer usually includes within the field of its operations many fairly distinct lines of work, from that of the roustabout, engaged in the ordinary labor that almost anyone may perform, to that of the expert sawyer, which can be done safely by those only with skill and experience. The difference between these various kinds of work was always recognized by the common law, and it has been generally held to be negligence for the master to require of the servant, without warning and instructing him, the performance of work outside and more dangerous than that which the latter had contracted to perform. Such classification of work exists in the very nature of things. Its recognition is required by any organization of a factory, not only for efficiency, but as well for the purpose of guarding against accident and injury; and if an employee, when there is no emergency, shall of his own volition see fit to intermeddle with something entirely outside the work for which he is employed, and doing something for his own use, he ought not to be allowed compensation.

Sullivan's Case, Supreme Jud. Ct. (Maine), decided Oct. 18, 1929. Claimant had been employed in a woolen mill as a general helper, his duty was to carry cloth from one place to another, and to assist any of the operators who might need him. At the time of the accident he walked over to the shearing machine to ascertain whether Tabor desired his help. Tabor had not called him, or given him any signal or indication that he needed him. As he stood waiting he reached out his hand and "touched the blanket that was moving" just out of curiosity. His hand was carried quickly to the knives and four fingers and part of the thumb severed. Held, that the injury was a result of Sullivan's own voluntary act, done only out of curiosity, entirely independent of any duty required to be performed, or incidental thereto, and consequently not in the course of employment, and therefore not arising out of the employment.

In the case of *Patterson v. Lumber Company*, 145 N. C., the plaintiff was employment by the defendant to straighten boards in its planing mill. It was alleged, and there was evidence tending to prove, that where any employee who, operating a planing machine, called upon him to take his place while absent, he had been ordered by the manager to do so; that McWyan, who had charge of one of the planers, left his place and requested the plaintiff to operate the machine while he was away. Plaintiff undertook to do so, and while feeding the machine his hand was cut and lacerated by a revolving cylinder, the machine being, as he alleged, in a defective condition. Held,—the plaintiff could not recover.

In the Patterson case, *supra*, the Court said "where the employee steps outside the line of his duty, or goes beyond the scope of his employment and does something he is not required to do, he cannot recover from his master for any consequent injury, for in that particular he is not his servant, and his contract does not provide for the new risk which he thus assumed and to which he exposes himself. The result is the same where the servant, without the order or request of his employer, or his representative, or contrary to his orders, or at the request of another employee who has no authority from the master to make it, undertakes to do something not assigned to him. In such a case he assumes all the risk of the injury. The master contracts to exercise ordinary care for the purpose of keeping his premises, his machinery, his tools and his appliances in a reasonable condition of safety for the protection of his servant employed to perform a stated service, and who is entitled to that protection while engaged in his work so long as he continues therein and confines himself to what he is employed to do. The duty of the master to furnish safe and suitable implements and appliances, which due care for the protection of his servant would suggest, extends only to those employees who are required, permitted, or expected, in the course of the employment, to make use of the instrumentalities provided by him, or who, while in the performance of their work, may be injured by them if they are defective. Where the servant departs from the sphere of his assigned duty, the relation of master and servant is considered as temporarily suspended. The servant's position is, then, analogous to that of a trespasser, or, perhaps, of a bare licensee, and his master owes him no duty, nor is he under any legal obligation to anticipate his deviation from his instructions and the possible danger which may arise to him therefrom, and, consequently to provide means for averting it. The servant becomes a volunteer as to the particular act which is outside the scope of his service and which he attempts to perform. He must, therefore, take things as he finds them and suffer the consequences of his own error.

The master cannot be held liable therefor, as the law will not, on obvious grounds of justice, compel the master to answer in damages for any injury which the servant has brought on himself by undertaking to do that which he was not directed or required to do, and it refers his injury not to the fault of the master, but to his own unnecessary and gratuitous act. Where the servant leaves his own work to do something else for which he was not engaged, the duty of the master towards him reaches its vanishing point, as it has been said, at the moment of the transition, and his corresponding liability for a resulting injury disappears. There being no longer a contractual or legal relation imposing any duty on the master for a breach of which he would beliable, it follows that there is nothing upon which to rest any claim for damages."

In the case of *Shoffler v. Lehigh Valley Coal Company*, Supreme Court of Pa., June 25, 1927, 139 Atl. Rep., 192, it was held where an employee voluntarily and without necessity abandons his employment, or steps entirely aside from the line of duty, he suspends the relation of employer and employee, and puts himself in the position of a stranger or licensee.

The Commissioner has examined all of the authorities available upon the subject, and with one exception, to wit: *Eodice v. Budd Mfg. Co.*, Vol. IX, Pa. Workmen's Compensation Reports, page 453, the decisions of the Commissions and Courts seem to be uniform.

Award

It is ordered that an award issue denying compensation.

[Docket No. 143]

D. J. SISK, Employee, Plaintiff, v. ORA MILL COMPANY, Employer, and AMERICAN MUTUAL LIABILITY INSURANCE CO., Carrier, Defendants

Filed February 28, 1930

ARISING OUT OF AND IN THE COURSE OF.—Employee while delivering message to another employee about Master's business and sustains injury entitled to compensation.

Hearing before J. DEWEY DORSETT, Commissioner, at Shelby, N. C., February 20, 1930.

Plaintiff represented by *Mr. C. B. McBrayer*, Attorney of Shelby, N. C.

Defendants represented by *Mr. Whisnant*, of the law firm of Ryburn & Hoey of Shelby, N. C., and *Mr. W. A. Dodderer* of Charlotte, N. C., Adjuster for the American Mutual Liability Insurance Co.

Opinion by DORSETT, Commissioner.

Statement of the Case

The plaintiff, D. J. Sisk, was an employee of the Ora Mills, defendant. and also a tenant of the said defendant, having leased from them one of the cottages in the mill village. On September 9, 1929, the date of the accident, the plaintiff, having discovered a leak in the cut-off valve of a pipe to his house, in accordance with the instructions of the defendant employer, a copy of which was placed in the toilet of the plaintiff's house, took the usual steps to have it repaired. Section 9 of the said instructions directed that he report the matter to the master mechanic of the Ora Mills. The plaintiff, on the morning of the accident, went to work at ten minutes to six and worked until 6:00 or 6:30 getting his work up; he then left his work, and went in search of the master mechanic, who was in another department. The master mechanic being absent at the time, the plaintiff approached Mr. Starnes, the assistant mechanic, who stopped the lathe on which he was working; the plaintiff advised Mr. Starnes that there was a leak in the cut-off valve, and remained talking to him from three to five minutes, all of which time he was explaining the situation with regard to the valve. His hand was resting on the lathe at which Mr. Starnes had been working, and which was idle at the time. Just as the plaintiff finished his explanation, one Southers stepped between him and Mr. Starnes, at which time Mr. Starnes set the machine in motion again. The lathe caught the plaintiff's hand, injuring same, as a result of which injury the plaintiff was temporarily totally disabled for a period of five weeks and three days.

Dr. Moore testified that the plaintiff's middle finger was amputated just beyond the junction of the middle segment; in other words, that he had lost more than one phalange. He testified that the index and ring finger were also stiff, but that by manipulation and massage they could be improved a good deal; that although they could be wonderfully improved there would always be a slight tendency towards stiffness.

Mr. Starnes testified that it was the custom for the employee, during working hours, to come in and make reports such as this to the master mechanic or himself, nad that he had never heard of anyone being discharged for so doing. He also testified that he did not know of any rule against the employees talking to each other when they were caught up with their work.

Mr. Siske also testified that it was customary to make such reports during working hours, and that they were made to either the master mechanic or Mr. Starnes, whichever one happened to be present.

Upon all of the evidence the Commission makes the following

Findings of Fact

1. That the parties, plaintiff and defendant, are bound by the provisions of the Workmen's Compensation Law, neither of them having rejected the same.

2. That the risk of the Ora Mills is insured with the American Mutual Liability Co.

3. That the plaintiff was regularly employed by the defendant, the

Ora Mills, at the time of the accident, at an average weekly wage of $13.20

4. That the plaintiff was a tenant of the Ora Mills Co., and that as such tenant he was ordered and instructed by the said Ora Mills to report all trouble around the house to the master mechanic, and that while talking to one C. H. Starnes, mechanic for the defendant company, he sustained an accident.

5. That the said accident arose out of and in the course of his employment.

6. That the plaintiff as a result of this accident was temporarily totally disabled for a period of five weeks and three days.

7. That the plaintiff suffered the loss of more than one phalage of his middle finger, and a stiffness and loss of use of the index and ring fingers amounting to ten per cent, which will be permanent.

Upon the above findings of fact, the Commission bases the following

Conclusions of Law

The principal questions involved in this hearing were whether the accident which the plaintiff suffered on September 9, 1929, arose out of and in the course of his employment, and the extent of the disability which resulted from the said accident.

The evidence is that the plaintiff was instructed to report all troubles about the house to the master mechanic of the Ora Mills. Section 9 of the rules of the company, posted on the door of the toilet of the plaintiff's house, reads: "Should anything around the house become in need of repair, notify the master mechanic at once." The plaintiff, in accordance with section nine, after getting his work in "ship-shape" went to the department in which the master mechanic worked, and finding him absent, advised his assistant of the condition of the plumbing, and while so doing, suffered an accident. In view of the fact that the plaintiff was instructed to report such trouble to the master mechanic—an employee of the mill—the Commission is constrained to hold that the mill intended that such report should be made during working hours, and that the mill regarded the tenancy and employment as being so linked together as to permit the plaintiff to leave his department and go to the mechanical department to make such report. Since no place is specified where the plaintiff should see the master mechanic, the assumption is that he was supposed to locate him at the place in which he would be by reason of his position as master mechanic. Moreover the plaintiff was caught up with his work. Mr. C. H. Starnes testified that it was the custom for the employees of the mills to report such troubles during working hours to him (Starnes) or the master mechanic. Mr. Sisk's testimoney on this point was to the same effect.

It is immaterial that the plaintiff reported the leak to the assistant mechanic instead of the master mechanic himself, as it was to be reported to the master mechanic by virtue of his office, and by implication, the a report to an employee working under and with the said master mechanic instructions were to report to the *department* of the master mechanic, and should be taken as a report to the master mechanic himself. Moreover, according to the testimony of Mr. Starnes, it was customary to report such matters to "the one they could catch in."

It does not appear in evidence whether any charge was made for such repairs, nor whether such repairs were actually made, as a result of the report to Mr. Starnes, but as nothing to the contrary appears, the assumption is that the repairs were made, indicating that it was immaterial whether the report was made to the master mechanic or his assistant.

By way of dicta, the Commission might state, that even had not the instructions clearly shown that it was the intention of the mill that such troubles be reported during working hours, under previous decisions of this Commission Mr. Sisk's injury would be compensable. In *Queen v. Clyde Mills*, the Commission, speaking through Commissioner Dorsett, ruled that where an employee is caught up with his work, and is waiting for further work, and is injured while talking to another employee while so doing, the injury occurs out of and in the course of the employment. This ruling is approved in *Bradley v. Ozark Mills*, in which Commissioner Wilson held that an employee who was injured while playing outside of the mill, at a time when he was up with his work, was entitled to compensation. In the instant case, as in those cited, there was no rule, so far as appears in evidence, against conversation between the employees when they were caught up with their work.

The doctor's testimony, with respect to the extent of disability, is self-contradictory, as at one time he testified: "The index finger finger could be considered as one hundred per cent now, and the ring finger could probably get that way by a little manipulation." Later he stated that the index finger was "not one hundred per cent—it might be 99½ per cent." Still later he testified that "how it would come out would depend on how he got that stiffness—whether it was due to local infection or not." He also said that there "would always be a tendency to slight stiffness, although it would be wonderfully improved by proper manipulation." From the condition of the finger, and from the doctor's testimony, the Commission considers that ten per cent loss of use of the index and ring fingers is reasonable.

Award

It is ordered that the defendant, the American Mutual Insurance Company, pay to the plaintiff, D. J. Sisk, compensation at the rate of 60 per cent of $13.20, or $7.92, for the period of five weeks and three days for temporary total disability, and thirty weeks for the loss of more than one phalange of the middle finger, the same constituting under the ruling of the Commission the loss of the entire finger, and also three and one-half weeks for ten per cent permanent loss of use of the first finger, and three weeks for ten per cent permanent loss of use of the third finger. The total amount, or such part of it as is due at the present time, is to be paid in a lump sum. Each party shall bear its own costs. The defendant insurance carrier shall pay from this award the sum of $50 to C. B. McBrayer, attorney of Shelby, N. C.

[Docket No. 216]

HAROLD G. FREEMAN, deceased, W. D. PENDLETON, administrator, Plaintiffs, v. B. & N. MOTOR COMPANY, employer, MARYLAND CASUALTY CO., Carrier, Defendants

Filed February 28, 1930

PERSONAL REPRESENTATIVE.—Deceased employee leaving no dependents, personal representative entitled to 60 per cent of average weekly wages for 350 weeks, less burial expenses.

FATAL CASES.—Where no dependents, personal representative entitled to same compensation as persons wholly dependent.

Plaintiffs represented by *B. S. Royster, Jr.*, Attorney, Oxford, N. C.
Defendants represented by *B. W. Parham*, Attorney, Oxford, N. C.

Opinion for full commission by ALLEN, Chairman.

This is an Appeal from an Award by WILSON, Commissioner, upon a claim from Granville County, North Carolina, heard before the Full Commission on Monday, February 24, 1930.

The sole question presented on this Appeal is whether or not the personal representative of a deceased, where there are no dependents, can recover any amount under Section 40, of the Workmen's Compensation Act. Section 40 provides that: "If the deceased employee leaves no dependents the employer shall pay to the personal representative of the deceased the commuted amount provided for in Section 38 of this Act, less the burial expenses which shall be deducted therefrom."

The Trial Commissioner found the following facts:

1. That deceased and dependents had accepted the provisions of the Compensation Law, and that the Maryland Casualty Company is the carrier.

2. That deceased was accidentally injured on November 17, 1929, while regularly employed by said defendant, and died the same day, as a result of said injuries; that said accidental injuries arose out of and in the course of the employment of said deceased by said defendant.

3. That said deceased had no dependents.

4. That W. D. Pendleton is the duly appointed, qualified, and acting Administrator of the estate of said deceased, and as such is the personal representative.

5. That the burial expenses have not been paid by the carrier, and that all medical bills except one has been paid by carrier.

6. That said personal representative is entitled to the amount provided for in Section 38 for those wholly dependent, but commuted and paid in a lump sum as provided for in Sections 40 and 44, less the burial expenses as provided for in Section 40.

7. That the average weekly wages were $22.00.

Upon the foregoing Findings of Fact, an Award was rendered providing for the payment to W. D. Pendleton, Administrator, of the estate of the deceased, Harold G. Freeman, the commuted amount of $13.20 compensation for 350 weeks, less the burial expenses.

The defendants contend with much force that Section 40 is inconsistent with the general spirit and purpose of the Compensation Act, and that it is in repugnant conflict with the provisions of Section 38 of the Act. It is further contended that the ruling of the trial Commissioner will have the effect, if sustained, of writing into the Compensation Act an insurance policy in the sum of $4,620.00 for the deceased employee in this case, and in all other kindred cases varying amounts, dependent upon the wages of deceased employees. It is further contended that Section 38, which must be construed in connection with Section 40, provides for compensation for death in only three types of cases, namely—(1) to persons wholly dependent upon deceased for support; (2) to persons partially dependent upon deceased for support; and (3) aliens; and it is contended that there is no commuted amount provided for in the cases referred to in Section 38, except aliens, or in any other provision or section of the Act, except the lump sum payments provided for in Section 44. It is further pointed out that the rule adopted by the Trial Commissioner creates a grotesque situation, by allowing to persons in no way dependent upon the employee a greater compensation than to those partially dependent.

The Commission has carefully considered the exhaustive briefs and able argument of counsel, the cogency of which the Commission takes this occasion to acknowledge, but it can not escape the conviction that Section 40 is a positive legislative declaration, not inconsistent with or repugnant to Section 38.

It was pointed out in the argument that the North Carolina Compensation Act was perhaps the only one which provided for compensation to the personal representative of a deceased person who left no dependents, but at the same time it was admitted by counsel that in some of the states there was provision in the Compensation Act for the payment of a sum certain in cases of death where there are no dependents, either into a State Fund or into some other fund, to be disbursed in accordance with legislative direction. In both instances the recovery is not based upon depedency, and the recovery, where there are no dependents, whether payable to a personal representative or to a State Fund, meets with the same objection, and the argument and reason against the recovery by a personal representative apply with equal legal force to a recovery payable into some fund for distribution to persons other than dependents.

Commissioner Wilson, in his well considered opinion in this case, has discussed a legislative history of Sections 29 and 40, and has pointed out at least one evil which Section 40 was intended to prevent. It must be remembered that Section 11 of the North Carolina Compensation Act makes the rights and remedies to an employee, his personal representative, parents, dependents, or next in kin, exclusive of all other rights and remedies at common law or otherwise, and if a personal representative can not recover for the death of his intestate, then there can be no recovery for death by any person, whether it be wrongful or otherwise. If such is the case, it is conceivable that in some employments a premium might be offered for single men with no dependents to the exclusion of the laborer with a family, and if such an enterprise should be developed on a large scale, the premium rate for such employment would be greatly reduced by the accident experience due to the non liability of the insurance carrier in cases of death.

It was admitted by counsel for the defendant, and the Commission will take judicial notice of the fact, that the premium rates in North Carolina are based upon the payment to the personal representative in cases of death, where there are no dependents, of sixty percentum of the average weekly wages of the deceased at the time of his death. The rate making authorities found the words of Section 40 as plainly expressive of an intent, and accordingly fixed the rates. Section 40 provides for the payment to the personal representative of *the* commuted *amount* provided for in Section 38, less *the* burial expenses. No amount is mentioned in Section 38 other than "a weekly payment equal to 60 per centum of his average weekly wages." The Commission therefore concludes that the commuted amount mentioned in Section 40 can only refer to the 60 per centum mentioned in Section 38. Again, burial expenses are mentioned in Section 38 in only one sentence, and this reference is in the same sentence in which the 60 per centum of average weekly wages is mentioned, and we therefore conclude that Section 40 in referring to *the* burial expenses could only have reference to the sentence of Section 38 in which burial expenses are mentioned. In other words, the pronominal adjective "the" in Section 40, indicates and refers to an antecedent, which is "burial expenses" mentioned in Section 38.

The money payable under Section 40 is the *amount* mentioned in Section 38, which is sixty percentum (60%) of the average weekly wages, *commuted* according to the discount rate fixed by a rule of the Commission. The latter portion of Section 38 deals with an entirely different subject matter, to-wit: Alien Dependents, and should have been in a separate Section.

But it is contended that the Legislature has not prescribed any rule or table to guide us in arriving at a commuted amount, and the question is asked if it is four, five, or six per cent compound discount. The answer is that the discount rate is fixed by the Commission at a rate not to exceed in any event the legal rate of interest discount, and that it may be four, five, or six per cent, according to the rule. The Legislature, by Section 54, of the Act, delegated to the Commission the power to make rules not inconsistent with the Act for carrying out the provisions of the Act. Acting under this power the Commission has promulgated some thirty rules, one of which deals with the rate discount to be used in arriving at lump sum settlements.

Commute means to pay in gross, at a reduced rate, instead of part by part, and the Legislature has given the Commission power to fix this rate or method of exchange.

This rule of substitution has been acted upon by the Commission, Employers, and Employees, without dissent until now. If this Commission has not the right to fix the discount rate in lump sum settlements with a personal representative, it has not the power to fix the amount in any other settlement; and its acts in all lump settlements heretofore made, some of which have been assented to by the defendant insurance carrier, are void, and if its present contention is sustained it may be required to pay weekly compensation to a number of employees and dependents who have already been settled with by lump sum payments.

It is beyond question the duty of Courts, in construing statutes, to give effect to the intent of the law making power, and seek for that intent in every legitimate way. The legislature must be understood to mean what it has plainly expressed, and if a statute is free from ambiguity this Commission has the simple and obvious duty to enforce it according to its terms.

It was argued that Section 40 was in conflict with every theory and principle of the Workmen's Compensation Laws, and repugnant to Section 38; and that therefore the Commission should hold that Section 40 is inoperative and void. As we see it, Section 40 is not inconsistent with or repugnant to Section 38, and if the legislature has expressed its intention in the law itself with certainty, the Commission has no right to depart from that intention on any extraneous consideration or theory of construction.

The Commission hereby adopts the Award and Opinion of Commissioner Wilson, including his Findings of Fact and Conclusion of Law, as the Award and Opinion of the Full Commission.

DISSENTING OPINION
OF
J. DEWEY DORSETT, COMMISSIONER

Filed February 28, 1930

Upon review of this case before the Full Commission, I am dissenting from the Opinion of a majority of the Full Commission sustaining the Opinion filed by Commissioner Wilson on February 24, 1930. The Opinion as to the sole right of the personal representative to prosecute an action for the wrongful death of the deceased is correct for that the deceased left no dependents and the Opinion of the majority sustaining in these respects the findings and conclusions of the original Opinion filed by Mr. Wilson are in accord with my views.

The Opinion as to the amount to which a personal representative is entitled is not in my opinion the correct interpretation of the Compensation Act.

Under Section 11 of the Act, the rights and remedies therein granted and prescribed by the Act are exclusive as to all rights and remedies of the employee and others including his personal representative as against the employer at common law or otherwise. At common law the right of action for wrongful death did not survive, and Lord Campbell's Act is the first statute giving the personal representative the right to sue for damages for wrongful death. C. S., Sec. 160, was in effect prior to July 1, 1929, and prescribes that the right of action survives for wrongful death and the amount recovered shall be distributed as provided therein, and shall not be subject to payment of debts or legacies.

Sections 29 and 40 purport to provide for payment of an amount to the personal representative of deceased for accidental injuries resulting in death arising out of and in the course of the employment of deceased, and Section 11 heretofore referred to, attempts to make the right under Section 40 exclusive and Section 77 repeals all acts and parts of acts inconsistent with any provision of this act.

For the Workmen's Compensation Act to operate as a repeal of C. S., Section 160, it must be construed to do so by implication, as it does not specifically repeal the former statutory remedy provided for wrongful death. C. S. 160. In order for the repeal to be by implication it must clearly appear that the later or revising statute covers the whole subject matter of the antecedent act, and it plainly appears that the purpose of the legislature to merge this into the whole law on the subject, before a repeal by implication is effective. (See *Winslow v. Morton*, 118 N. C. 486.)

Our Court, under the rules of construction, stated would require before declaring C. S., Section 160, as being repealed by the Workmen's Compensation Act, that this Act be a valid statute, clear and unambiguous in terms, and mutually repugnant and contradictory or contrary to the Act in effect prior to July 1, 1929. The Workmen's Compensation Act, Section 29, prescribes "in case of death the total sum paid shall be $6,000, payable in one sum to the personal representative." Nothing else appearing in the Act, and the legislative intent and purpose of the whole Act not being shown to be contrary to this sentence of Section 29, there would be sufficient grounds on which to conclude that the personal representative would be entitled to $6,000, and the Section would act as a repeal of the existing remedies of the personal representative.

Such is not the case. The Act as a whole is for the purpose of compensating injured employees or their dependents for injuries or death attributable to industrial accidents arising out of and in the course of the employment.

In the case of *Partin v. Partin* (Tenn), 261 S. W. 363, the Supreme Court of Tennessee expresses the purpose and intent of the Workmen's Compensation Act as follows: "The Workmen's Compensation Act is not a statute of descent or distribution. It was intended to relieve society of the burden of caring for injured workmen or the dependents of deceased workmen, and to place that burden upon the industry employing the workmen. In case of a workman's death, the law makers were concerned for the care of his dependents, not about devolution of the workman's property. The dependency of the claimant is the true basis of his right to compensation rather than blood or marriage. "Relationship is really only evidence of dependency." For the purpose *only* of showing to the extent some courts restrict the purposes and benefits of their Compensation Act and not citing with approval the principle therein expressed, since the question is not involved herein, the Court of Appeals of Georgia, in *Guaranty Co. v. Hairston*, 139 S. E., page 685, held: "Where compensation payable in weekly installments under the Workmen's Compensation Act has been awarded widow for death of husband and widow dies before all installments awarded her have become due and payable, installments becoming due after her death are not payable to widow's estate. The Georgia Workmen's Compensation Act contemplates that compensation thereunder shall be awarded to dependents only."

In construing the constitutionality of the Utah Compensation Act, the U. S. Supreme Court in *Arizona Copper Co. v. Hammer*, 250 U. S., 400, 63 Law Ed., 1058, 39 Sup. Ct. Rep., 553, stated: "The Act, assuming, as we must, that it be justly administered, adds no new burden of cost to industry, although it does bring to light a burden that previously existed, but perhaps was unrecognized, by requiring that its costs be taken into the reckoning. The burden is due to the hazardous nature of the industry, and is inevitable if the work of the world is to go forward. What the act does is merely to require that it shall be assumed, to the extent of a pecuniary equivalent of the actual and proximate damage sustained by the *workman* or *those near to him* by the employer, by him who organizes the enterprise, hires the workman, fixes the wages, sets a price upon the product, pays the costs, and takes for his reward the end profit, if any." Continuing the opinion states: "To the objection that the benefits of the Act may be extended, in the case of death claims, to those not nearly related to or dependent upon the workman, or even may go by escheat to the State, it is sufficient to say that no such question is involved in these records: In *Arizona Copper Co. v. Burciaja*, (Arizona,) 177 Pac., 29, a case of personal injuries not fatal, the Supreme Court of Arizona interpreted the Act as limiting the recovery to compensatory damages; it may reasonably be construed in its application to death claims; and it would be improper for this Court to assume in advance that the *State Court will place* such *a construction upon the statute as to render it obnoxious to the Federal Constitution. Plymouth Coal Company, v.* Pa., 232 U. S., 531, 58 Law Ed., 713, and cases cited."

Emphasizing the statement as to the true principles of Workmen's Compensation Acts, it is found, upon examination of the acts of each State of the Union having similar Acts, that but one State makes any provision for payments to an administrator or personal representative. Kentucky has a provision for the payment of $100.00 (one hundred dollars) to the personal representative where there are no dependents. This presumably is only to cover burial expenses. All other States except six uniformly make provision in case of death with no dependents for payment only of medical bills and funeral expenses.

Of the six referred to, two make no provision whatever for payments in case of death with no dependents.

Four States have Acts providing only for payment into a State fund for rehabilitation work a certain amount in cases of death without dependents.

Being contrary to the principles of Workmen's Compensation Acts, are we justified in so construing a vague and meaningless section such as section 40 so that it will have the effect of a valid legislative act? I think not.

Our Act, Section 2 (k), defines compensation as the "money allowance payable to an employee or to his dependents" with no mention of "personal representative." Neither Section 29 nor 40 provides that any compensation be paid the personal representative although the Act is entitled "Compensation Act."

Both sections provide for payment of a "sum" or a "commuted amount." The Act does not require that insurance be provided for the payment of anything other than "compensation."

Section 67 in part reads: "Every employer who accepts the provisions of this Act relative to the payment of *compensation* shall insure," etc.

Section 68 reads in part: "Every employer accepting the *compensation* provision of this Act."

Section 70 reads in part: "All policies insuring the payment of compensation," etc.

The Act not providing by any of its terms, the payment of compensation to a personal representative, and the term compensation not being defined as any amount payable to a personal representative, it must be concluded that the personal representative would not be entitled to any compensation benefits.

In the case of *Smith v. Power Co.*, the Commission has held that Section 29 is inoperative and of no effect and void in case of death, and the reasons therein assigned are sound.

Section 40 recites that where there are "no dependents," the personal representative shall be paid the commuted amount provided in Section 38 in case of death.

Conceding, but not admitting, for our purpose that this Section, by implication, repeals in part Section 160 of the Consolidated Statutes, does it set out any definite standard by which the amount payable in cases of death to a personal representative may be ascertained?

The money payable under Section 40 is the "*commuted amount*" specified in Section 38.

Section 38 does carry the expression "commuted amount" but has referred to commuting all future installments of compensation to alien dependents by paying them one half of the "commuted amount" of such future installments of compensation.

Now, alien dependents are of two classes, wholly dependent aliens and partially dependent aliens. Wholly dependent aliens receive sixty per cent of the average weekly wage for 350 weeks, while partial alien dependents would receive the proportion of the amount payable to wholly dependents as the amount contributed bears to the annual earnings of the employee. Bearing in mind that either the amount due wholly dependent and partial dependents may be commuted, which basis shall we accept? The Act carries no inference or any indicia to guide us. Further, by what rule or table has the Legislature prescribed that the commuted amount shall be arrived at, shall we use a 4 per cent, a 5 per cent or a 6 per cent compound discount or the present worth of an annuity as provided for in C. S., Sec. 1790? Sec. 44 only gives the right to fix lump sum settlements between employers and employee or his *dependents*.

Section 44 provides that a commutation may be made of the amount due resident dependents as provided for in Section 38. In using this commutation basis we are confronted with the same question, what the legislature intended, should the amount commuted be the amount payable to wholly dependents or partial dependents?

If the personal representative is entitled to the same amount as the widow or child who are conclusively presumed to be dependents, then would there not be a great injustice done in those cases where a mother is partially dependent upon a minor son, and would receive much less than in a case where no dependency existed, and a personal representative had qualified?

Section 36 provides for payments of compensation to the dependents only of a deceased employee, in case of an injury resulting in death occurring outside the State. Could the Legislature have intended a different rule in such cases than was intended for accidents occurring within the State? In a recent case our Court has denied this privilege to non-residents. Again, could the Legislature have intended discrimination in those cases of unpaid specific awards wherein death ensued from other causes and only provide that unpaid compensation be payable to dependent next of kin, and then intend that in other cases of death, not covered by Section 37, the next of kin *not dependent* were entitled to the compensation benefits?

Under the majority opinion there would not be paid to the personal representative any "compensation," as there is no provision for paying compensation, only for the payment of an amount or sum. Therefore, this amount or sum would have to be applied to payment of debts of the "deceased," since there are no restrictions surrounding the disposition of such "sum" or "amount." Thus, in effect, the industry of the State is forced to insure the debts created by its employees and further this violates another principle of the intent of the whole act as expressed in Section 21, exempting "compensation" from claims of creditors. This is also contrary to C. S., Section 160, exempting a recovery for wrongful death from debts of the deceased. It may be that the present compensation insurance rates are high because of the doubtful meaning of the legislature in its provision for death benefits. Certainly these rates will not be reduced if the Courts place the same construction upon the act as was done when the high rates were assessed.

Apprehension has been expressed that the employers upon ascertaining that the Compensation Act has failed to provide for payment of compensation in cases where there are "no dependents" will immediately discharge all employees without dependents. I do not anticipate any such action. We have in our Act a provision for payment of compensation to persons wholly dependent, which provision provides for a much larger payment than in cases where only partial dependency exists, and no intimation or suggestion has been made that the employers are discharging employees because they happen to have persons wholly dependent upon them.

In writing this dissenting Opinion I follow my own conviction that the Act is vague, indefinite and ambiguous as to such payments—therefore, void and of no effect.

For the reasons assigned it is my opinion that the claim should be dismissed.

Following cases heard and determined, but are valueless as precedents and not published in advance sheets:

E. C. Chappell v. C. L. Sharp Company and Ocean Accident and Guarantee Company, Docket No. 196.

Granison Kennedy v. Collins Guaranty Company and Maryland Casualty Company, Docket No. 183.

Jno. M. Penninger v. Ford Motor Company, Docket No. 185.

Chas. Johnson v. Duke Construction Company and Liberty Mutual Insurance Company, Docket No. 188.

Ike Straughan v. Oettinger Lumber Company and Liberty Mutual Insurance Company, Docket No. 203.

J. J. Padgett v. Carolina Ice Company and Employer's Mutual Life Insurance Company, Docket No. 204.

John Ed Bullock v. J. A. Wilkerson, Docket No. 125.

Paul A. Matthews v. Raleigh Hopewell Ice and Coal Company and American Mutual Liabilty Company, Docket No. 289.

Willard Adams v. Andrews Tanning Company and Liberty Mutual Insurance Company, Docket No. 107.

J. H. Bradshaw v. J. H. Baldwin (non Insured), Docket No. 244.

Robert Rathbone v. J. H. Baldwin (non Insured), Docket No. 244.

W. H. Ross v. Weaverville College and Employer's Mutual Insurance Company, Docket No. 256.

C. W. Conner v. American Euke Corporation and Travellers Insurance Company, Docket No. 282.

Roy Mathis v. Blackwood Lumber Company (Self Insurer), Docket No. 235.

Dock Henry v. Long Snyder and Cogdell Co. v. Maryland Casualty Company, Docket No. 268.

Sanford Crews v. Whiting Lumber Company (non Insured), Docket No. 230.

Garfield Guy v. Whiting Lumber Company (non Insured), Docket No. 227.

Garland M. Dagenhart v. T. L. Brinkley and London Guarantee and Acc. Company, Docket No. 285.

Lewis Baumgardner v. Rigdon Motor Company and Employers Liability Company, Docket No. 278.

Vol. I Pages 333 to 370 No. 7

ADVANCE SHEETS

OF

OPINIONS IN CASES

HEARD AND DETERMINED
BY THE

NORTH CAROLINA INDUSTRIAL COMMISSION

RALEIGH

APRIL, 1930

OPINIONS TO APRIL 1

SUBSCRIPTION PRICE $5.00 PER YEAR
IN ADVANCE

PUBLISHED MONTHLY FOR THE COMMISSION
BY
EDWARDS & BROUGHTON COMPANY
RALEIGH, N. C.

Entered as second-class matter January 25, 1930,
at the post-office at Raleigh, North Carolina,
under the Act of March 3, 1879.

INDEX

Case *Page*
J. J. Breakfield et al. *v.* H. D. Horton et al. 333
Luther Perry Horne *v.* City of Fayetteville et al. 334
Charles Adams *v.* Victory Manufacturing Co. et al. 336
John Rice *v.* Denny Roll and Panel Co. et al. 341
Granison Kennedy *v.* Collins Granite Co., Inc. et al. 346
John Propst *v.* City of High Point et al. 349
H. W. Brady *v.* Nello L. Teer et al. 353
Paul Collins et al. v. Wayne Tire Co. et al. 357
William Snuggs *v.* Carolina Coal and By-Products Co. 359
C. E. Wheeler *v.* City Ice and Fuel Co. et al. 363
J. G. Brinkley *v.* Williams Lumber Co. et al. 365

NORTH CAROLINA INDUSTRIAL COMMISSION

MATT H. ALLEN, CHAIRMAN
J. DEWEY DORSETT
T. A. WILSON
COMMISSIONERS

E. W. PRICE, SECRETARY

ELEVENTH FLOOR RALEIGH BANK & TRUST BUILDING
RALEIGH, N. C.

[Docket No. 197]

J. J. BREAKFIELD, Deceased, SALLIE MAE BREAKFIELD, Widow,
J. J. BRAKEFIELD, Son, MARY H. BREAKFIELD, Mother, Plaintiffs,
v. H. D. HORTON, Receiver, Employer, EMPLOYERS MUTUAL
LIABILITY INSURANCE COMPANY, Carrier, Defendants

Filed March 1, 1930

AVERAGE WEEKLY WAGES.—Where employment is brief, wages deceased would be earning were it not for injury, is correct basis for that insurance premiums are collected on this wage.

Opinion for full commision by ALLEN, Chairman.

This was an Appeal from the decision of Commissioner Wilson, heard before the Full Commission, at Raleigh, N. C., on Monday, February 24, 1930, in the Hearing Room of the Industrial Commission.

The sole question presented from this Appeal is as to the correct amount of the average weekly wages of the claimant, and the time of his death.

The defendant contended that the Commission should find that $21.00 was the average weekly wages of the deceased at the time of his death, while the plaintiff contends that $25.00 is the correct amount to be found by the Commission as a basis for compensation.

From the evidence of this case it is impossible to apply the rule provided by Sub-section "E," of Section No. 2, of the Compensation Act, in computing the average weekly wages, and for that reason the Commission must, therefore, resort to some other method as in its opinion will most nearly approximate the amount the injured employee would be earning were it not for his injury and death.

The defendant was paying the plaintiff at the time of his death the sum of $25.00 per week, and the defendant testified that he was trying to make a truck driver out of the plaintiff. It appears that he was employed in the capacity of a prospective truck driver. It is evident that the defendant considered the plaintiff competent to qualify as a truck driver, otherwise he would have been employed as a helper, at a salary less than $25.00 per week.

The plaintiff had been in the employ of the defendant two weeks before the accident, and for more than a year previous to this he worked and lived with his father on a farm in South Carolina.

In computing the average weekly wages, the Commission is not bound to calculate the entire earnings during the year preceding the accident, including the earnings in other employments, indeed it has been held improper to compute the average weekly wages by this method: *Kadison v. Gottlieb*, 9 Comp. Rev., page 898 (233 N. Y. Supp. 485); *Blatchley v. Dairymen's League*, etc., (232 N. Y. Supp., 437).

In Gagon's case, 228 Mass., 334, 21 A. L. R., 1528, 117 N. E., 321, 16 N. C. C. A., 286, where the meaning of "average weekly wages" was considered, it was said: "It is plain that this definition confines ascertainment of the wages to the actual employment at the time of the injury, save in the single instance where that is impossible by reason of brief employment in a line of work unusual to the employer. . . . This definition and the decisions rendered respecting it would follow directly the 'basic principle of the Act' as above stated, to the effect that 'the cost of injuries incidental to modern industry' should be regarded as a part of the cost of the production. The average weekly wages is throughout the Act ascertainable only by reference to the wages actually paid at the expenses of the industry at which the employee is working. Save in carefully specified exceptions, it is to be ascertained only by reference to the wages paid by the particular employer to the injured employee. It is apparent that the standard for determining the entire cost of the production so far as it includes the cost imposed by the Workmen's Compensation Act, may be found by reference to that particular industry and employer."

Also, *Mills v. Transylvania Tanning Company,* (Docket 51) N. C. I. Comm. Reports, page 189.

The defendants have offered no rule by which any other amount may be correctly found to be the average weekly wages, and the defendant carrier collected its premium upon the basis of a $25.00 weekly wage to this claimant, and it must accordingly pay him.

The Findings of Fact, Award, and Opinion of Commissioner Wilson are hereby affirmed and adopted as the Findings of Fact, Award, and Opinion of the Full Commission.

[Docket No. 261]

LUTHER PERRY HORNE, Plaintiff, Deceased, v. CITY OF FAYETTEVILLE, AMERICAN CASUALTY COMPANY Defendant

Filed March 3, 1930

VOLUNTEER FIREMAN.—Partial dependents awarded compensation based upon amount paid deceased as fireman by city.

PARTIAL DEPENDENTS.—Compensation based upon proportion that contributions by deceased to dependents bears to annual earnings of deceased in employment as fireman.

Hearing before T. A. WILSON, Commissioner, at Fayetteville, N. C., February 17, 1930.

Plaintiff represented by *W. C. Downing*, City Attorney, Fayetteville, N. C. Defendants represented by *A. M. Tucker*, Manager Liability and Compensation Claim Department, American Casualty Co., Reading, Pa.

Opinion by WILSON, Commissioner.

It was admitted in open court by parties plaintiff and defendant, that:

1. Plaintiff was working for the City of Fayetteville, in the capacity of volunteer fireman, and while so engaged for the City of Fayetteville, sustained an accident on December 21, 1929, which resulted in his instant death.

2. That during the twelve months immediately preceding the accident plaintiff received $202 actual pay for his services to the city as a volunteer fireman.

3. That plaintiff was paid $1.50 for each day call answered, and $2.00 for each night call answered. That the hours of division were from seven to seven o'clock.

4. That plaintiff was exempt from poll tax of one dollar per year; that plaintiff was exempt from driver's license, which was one dollar per year. Bed and room at the fire house were furnished this employee. The firemen were usually given a barbecue dinner once a year.

5. That the firemen were usually allowed a certain amount of money, averaging approximately twenty dollars per man, for the purpose of attending the Firemen's Tournament, or for going on a vacation. Some went fishing.

6. That the city carried on the volunteer firemen a thousand dollar life insurance policy and paid the yearly premium, which amounted to $10.40.

7. Plaintiff was twenty-five years of age and single.

It was learned that the funeral bill was $465.65. It was paid by the City of Fayetteville out of the insurance policy carried on Mr. Horne.

Mrs. P. M. Horne, mother of the deceased, testified that her son gave her six dollars per week for board; that her son would give her twenty to twenty-five dollars per month in addition for the support of herself; that some months it would be less; that he contributed "no certain amount, he just saw I needed it and gave it to me all along"; that her son did not sleep at home except when he was sick, that he always stayed at the fire house. She further testified "I felt like I had to have help from him"; she testified that her husband made thirty-three dollars per week; that her son made three dollars and a quarter a day working for the Jackson Lumber Company.

P. M. Horne, father of the deceased, testified that his son did make regular contributions towards the support of his wife and the rest of his family, and that he believed that the amount would aggregate one hundred and fifty dollars per year over and above his board, that his son contributed to their support whenever they were in need, the amounts being sometimes as low as two dollars and as much as forty or fifty dollars.

It was admitted that the burial expenses were $465.65; that this bill was paid by the City of Fayetteville out of the insurance policy carried on Horne, the deceased.

The Commission finds as a fact that Mrs. P. M. Horne was partially dependent upon her deceased son to the extent of one hundred and fifty dollars per year; that plaintiff's earnings for the twelve months preceding his death as a volunteer fireman was two hundred and fifty dollars, and that under Section 38 the mother is entitled to four dollars and twenty-five cents per week compensation as she was partially dependent upon the earnings of her son; that she is entitled to two hundred dollars as burial expenses.

Award

Mrs. P. M. Horne is awarded compensation for three hundred and fifty weeks at the rate of $4.25 per week, payable every four weeks; also two hundred dollars as burial expenses, and whatever medical bills that were necessary, if any.

Each party will pay its own costs.

[Docket No. 267]

CHARLES ADAMS, Plaintiff, v. VICTORY MANUFACTURING CO., Employer, and MARYLAND CASUALTY CO., Carrier, Defendants

Filed March 10, 1930

FAILURE TO REPORT ACCIDENT.—Employer's rights found not prejudiced by failure to report accident occurring on September 18 until December 26, 1929, where competent medical care was procured by employee and his condition prevented earlier reporting.

Plaintiff appeared in person.

Defendants represented by *L. F. Brinkley*, Adjuster for the Maryland Casualty Company, 1113 Johnston Building, Charlotte, N. C.

Opinion by WILSON, Commissioner.

Statement of the Case

The above styled case came on for hearing to determine four issues:

(1) Did the accidental injury arise out of and in the course of the plaintiff's employment by the Victory Manufacturing Company? (2) Was the accident properly reported to the employer? (3) What was the extent of disability? (4) Whether the employer's rights were prejudiced because the accident was reported after thirty days.

Charles Adams, the plaintiff, testified that about ten o'clock on Saturday morning, September 14, 1929, while regularly employed by the Victory Manufacturing Company as a chain builder, he turned over a chain, and a small cotter pin pricked him, or scratched him on his little finger of the right hand; that he gets scratched so often that he did not pay very much attention to it at the time; that he washed his hands with some turpentine and kept on working; that there was a little place punctured, but he never thought anything about it at the time; that on Monday morning there was a small white blister and he pinched it off; that he complained a right smart on Monday, but worked all day, and that on Tuesday he complained still more, but worked all day; that he was suffering terribly, but never thought of reporting it; that he thought he would put a poultice on it like his mother used to make for sores, but that did not do so well; that on Wednesday morning his little finger and hand were swollen as large as two hands; that his arm was swollen and red; that he thought the best thing to do was to go to see Dr. Kirksey right away, and that he went to see the doctor without eating any breakfast; that he lived about seven miles from the mill and that is was customary for workers in that neighborhood to ride the school buses going to work; that on Wednesday morning was the first day he did not work. He stopped the bus and told some of his fellow workers to report to his employer that he would be unable to work that day because of the condition of his hand, giving as the reason for not reporting the injury to the superintendent the fact that "it is an unwritten law among the textile employees that a man shall not go over his foreman to the superintendent. That is the law in this section among the mill people and I sent word to my foreman by these men." He further said that the injury was just a little thing, and that he would have been ashamed to say that he was hurt; that he worked over in a corner of the room about twenty-five or thirty feet from anyone else and that the other workers are not allowed to loaf in that corner, and for that reason nobody saw him when he got hurt. He further testified that it was a long chain and that he wanted to cut a piece off; that if he turned the chain over it would come out just right; that just as he jerked it over the cotter pin stuck him in his hand. He stated that he was unable to do any work at the time of the hearing as the result of said injury; that it was December 26, 1929, before he formally notified his employer of the accidenet; that he was a very sick man for some two or three weeks, beginning with the first day he did not work; that he began taking treatments on the Wednesday following the accident, and had been taking regular treatments ever since; that he had never been instructed about the Compensation Law, and that he did not remember seeing a notice posted in the mill about the Compensation Law and medical treatment until December 26, the day he reported the accident to the superintendent; that for several weeks following September 18 he was physically unable to go to the mill to make a report, and that he was thinking more about the undertaker than he was of reporting the accident.

Dr. W. A. Kirksey testified that the plaintiff told him that he had a little scratch, and that later he told him he had a little prick from a cotter key; that he (the doctor) told the plaintiff to report the accident to his employer, but for some reason he did not want to; that he was really too sick to report the accident at any time after the 18th; that he treated the plaintiff every day for ten weeks; that during the worst part, it was twice a day; that the little finger was swollen and full of pus the first time he treated it; that he considered the plaintiff had three-fourths impairment of the hand at the time of the hearing, but in another place the doctor says that the plaintiff has permanent contraction of his right hand and that it is almost in the shape it will be the rest of his life; that he does not think that an operation will do much good; that the plaintiff is unable to use his hand any at the present time; that it is more in his way and would be better if his fingers were cut off.

John H. Smith, who operates the bus which carried several of the mill employees, including plaintiff, to work each day, testified that one morning Adams came out to the bus and told someone to tell the boss he would not be there that day; that it was the first morning plaintiff stayed off; that he told them his hand was so bad to tell the boss man he would not be on that morning.

John D. Smith, an employee of the mill, testified that he visited the plaintiff at his home about a week after the alleged accident; that the plaintiff told him about how he was hurt, but never told him to report the accident; that he told him to tell Mr. Kittrell not to give his job away, that he would be back as soon as he could; that the plaintiff told him he had scratched his hand; that a little fester developed and he picked it; that the next morning it was all bulged up and he could not come to work; that he had scratched his hand while building chains. Smith, who was just a laborer at the mill, testified that the Compensation Law had never been explained to him and he knew nothing about the Law until Mr. Adams was hurt; that it was customary to go to Mr. Hart's and Mr. Monroe's office if any of them got hurt.

Murphy D. Brown, who worked in the weave room, testified that he went to see Mr. Adams where he worked, and he showed him his finger; that it was red and swollen, but Adams did not tell him how he hurt it; that he did not ask Adams how he hurt his finger; that there was a skinned place on top of his finger.

Emmitt Simmons, a weaver at the said mill, testified that three or four days after the plaintiff was out from work he sent for him; that the plaintiff told him about his injury and told him to tell Mr. Tidwell, overseer of the weave room, that he would be in just as soon as he could work; said to tell him he had a bad hand; that the plaintiff did not say anything about injuring himself with the cotter key; that it was sometime about the latter part of December that the plaintiff told him about injuring his hand with the cotter key.

H. R. Hart, Superintendent of the said mill, testified that they had instructed the heads of their departments to tell the employees about the Compensation Law, and that notices had been posted in the mill since about July 1, 1929, but that so far as he knew there had never been a meeting of all their employees to inform them about the Act and give them proper instruction.

M. C. Tidwell, overseer of the weave room, testified that he had given instruction to the employees about the necessity of making a report of all accidents, but that he had never had them all together at any one time; that the first notice that he had of Mr. Adams' accident was the day following Christmas; that he did not know whether the employees realized the necessity of reporting all small scratches for first aid treatment or not.

Upon the evidence in this case, the Commission makes the following

Findings of Fact

1. That the employer and employee have accepted the provisions of the Compensation Act, and the Maryland Casualty Company is the carrier.

2. That the plaintiff sustained an accidental injury about 10 a.m. Saturday, September 14, 1929, which arose out of and in the course of his regular employment by said employer.

3. That the plaintiff accidentally pricked or scratched his little finger of the right hand with a cotter pin while shortening a chain; as the result of said injury an infection developed.

4. That the plaintiff was totally disabled from September 18 to December 26, and that the plaintiff has completely lost the use of his right hand as the result of said accident and infection.

5. That the accidental injury was not formally reported to his employer until December 26, 1929.

6. That the employer's rights were not prejudiced because of the fact that the accident was not reported within the thirty-day period provided for in Section 22.

7. That the employee did not know his rights under the Compensation Law, but sought and obtained full and adequate medical treatment the morning of the fourth day following said accident; that the plaintiff was very sick for three weeks and during most of this time he had a high fever; that the employees of said manufacturing company were never properly instructed to report all accidents for first aid treatment regardless of how minor they might be.

8. That the average weekly wage was $10.45.

Conclusions of Law

The evidence in this case tended to show that even though the superintendent had instructed his subordinate executives to tell the employees to report all accidents, none of the subordinate executives had ever called all the employees under his or their departments together and instructed them as to the necessity of reporting all accidents for first aid treatment regardless of how minor the accident might be. It seems that the first aid treatment was administered from the superintendent's office and that the plaintiff in his own words said: "It is unwritten law among the textile employees that a man shall not go over his foreman to the superintendent. That is the law in this section among the mill people and I sent word to my foremen by these men." There appeared to be a fear on the part of the plaintiff that if he should report such a small accident to his superintendent that it might cause him to lose his job and that the injury appeared so little he was ashamed to say he was hurt.

Several of the witnesses testified that they had not received any instructions about reporting accidents under the Compensation Law.

Dr. Kirksey testified that the plaintiff was physically and mentally unable because of a high fever resulting from the infection to report the accident for some two or three weeks following his first treatment.

Section 22 of the Compensation Law reads as follows: "Every injured employee or his representative shall immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a written notice of the accident, and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this act prior to the giving of such notice, unless it can be shown that the employer, his agent or representative, had knowledge of the accident, or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity, or the fraud or deceit of some third person; but no compensation shall be payable unless such written notice is given within thirty days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice, and the Commission is satisfied that the employer has not been prejudiced thereby."

The last part of this section provides that no compensation shall be payable unless notice is given within thirty days of the accident, unless reasonable excuse is made to the satisfaction of the Industrial Commission, and the Commission is satisfied that the employer has not been prejudiced thereby. In this connection, it is quite evident that the plaintiff failed to report the accident because of fear and the fact that the accident was so minor and he did not know that an infection was classified as the result of an accidental injury.

The plaintiff in this case appeared in person; he was not represented by trained legal counsel, and from the testimony of his fellow employees, he told an honest, straightforward story.

If the employer is prejudiced because of failure to report the accident within the thirty day period, it is not because of the fact that the plaintiff did not get adequate medical attention or that he refused medical attention as provided for in Section 25, but it was because of the fact that plaintiff failed to report the accident immediately after its occurrence or during the two days and the part of another (Saturday) that he worked following this scratch.

After reading the full evidence and giving all of the facts and circumstances due consideration, the Commission cannot conscientiously say that the plaintiff is not entitled to compensation.

In *Rackman v. Albert Dixon Company*, 139 Minn., 30, 165 N. W. 478, 1 W. C. L. J., 422, the Supreme Court of Minnesota said: "The evidence is quite satisfactory that the blood poisoning and the ensuing death were the results of the scratch. The medical testimony is to that effect and the sequence of events leaves very little doubt on that point. That the scratch was received while he was engaged in his employment is not so clear. There was no direct evidence that the scratch was so received. We think, however, the evidence is sufficient. The fact that deceased had no scratch when he left home in the morning and had one when he came home from work at night, that he must have come home immediately, for he was home within half an hour of the time he quit work, that the scratch had blood upon it which had hardened, indicating that the scratch had been received earlier than the time he quit work, that it was such a scratch as he was not likely to receive on a trip from his work to his home, and such a scratch as he might well have received while at work, these facts taken in connection with the letter above quoted, which is of some force as an admission, were such that the court might infer that the scratch was received while deceased was in the course of his usual work and that it arose out of it."

The California Court said in the *Great Western Power Company v. Pillsbury et al.*, 171 Cal., 89, 151 Pac., 1136, L. R. A., 1916, A. 281, 11 N. C. C. A., 493: "We perceive no merit in the claim that this disability was not proximately caused by the injury and abrasion of the skin. Such results do ensue from such abrasions, and they are brought about by the operation of what are ordinarily considered natural forces; that is, by the intervention of infectious germs usually, or at least frequently, present in the air or on the surface of substances which any person may come in contact, and which are invisible to the eye and imperceptible to the senses." See also *Fleet v. Johnson*, 6 B. W. C. C., 60; Burns case, 218 Mass., 8, 105 N. E. 601, 5 N. C. C. A., 635; *White v. Ford Motor Co.*, W. C. and Ins. Rep., 25 (1918), 17 N. C. C. A. 93. Also see Section 206 entitled "Infection," Schneider on Workmen's Compensation Laws, Vol. 1, Page 390.

The Commission is unable to reconcile the testimony of the doctor who treated plaintiff that the plaintiff has three-fourths impairment of his hand and that the plaintiff is unable to use his hand any at the present time; that it is more in his way and it would be better if his fingers were cut off. The Commission, after an observation of the condition of the plaintiff's right hand and the testimony of the doctor, believes that plaintiff has a complete loss of use of his hand, and so awards.

Award

The plaintiff is awarded compensation at the rate of sixty per cent of his average weekly wage for total disability from September 18 to December 26, 1929, inclusive. He is also awarded compensation at the same rate for permanent loss of use of his right hand for a period of one hundred and fifty weeks, as provided for in Section 31 (m). He is also awarded full medical attention as provided for in Section 25 of the Act, subject to the approval of the Industrial Commission. The defendants to pay the costs.

[Docket No. 170]

JOHN RICE, Plaintiff, v. DENNY ROLL AND PANEL CO., Employer, LONDON GUARANTEE AND ACCIDENT CO., Carrier, Defendants

Filed March 10, 1930

TEMPORARY TOTAL PLUS SPECIFIC.—Amputation of member entitles claimant to compensation for temporary total disability under Section 29, and thereafter for specific compensation under Section 31, the latter not being *in lieu* of all other compensation.

Plaintiff not represented.

Defendants represented by *Carter Dalton*, Attorney at Law of High Point, N. C.

Opinion by WILSON, Commissioner, for full Commission.

This case came on for review before the full Commission February 24, 1930, at Raleigh, North Carolina, upon the appeal by the Carrier from the decision of Commissioner Dorsett, filed January 31, 1930, to decide the one issue, to wit: Has the Commission the right to award compensation for temporary total disability in addition to specific where there is an amputation?

Statement of the Case

On October 30, 1929, John Rice, the claimant, was regularly employed by the Denny Roll and Panel Company, at an average weekly wage of $25.13. On that date the claimant suffered an injury by accident resulting in some badly lacerated and amputated fingers on his left hand. The evidence tends to show that the fingers were either amputated at the time of the accident, or immediately thereafter.

Dr. Burrus of the Burrus Clinic of High Point, North Carolina, was the attending physician, and testified that because of plaintiff's injury it was necessary to amputate the distal phalange of the second finger, and to amputate more than half of the distal phalanges of the third and fourth fingers.

Upon the evidence, the full Commission makes the following

Findings of Fact

1. That the parties to this proceeding are bound by the provisions of the North Carolina Workmen's Compensation Act.
2. That John Rice, the claimant, on October 30, 1929, suffered an injury by accident that arose out of and in the course of his employment, and that as the result of said accidental injury, plaintiff has lost the distal phalange of the second, and more than one-half of the distal phalanges of the third and fourth finger of his left hand.
3. That the plaintiff was temporarily totally disabled for a period of seven weeks and two days immediately following the accident; and that plaintiff is entitled to compensation for temporary total disability in addition to the specific award for the loss of parts of members.
4. That the average weekly wage was $25.13.

Conclusions of Law

There is but little the full Commission can add to the Opinion of Commissioner Dorsett speaking to the subject of compensation for temporary total disability followed by specific in *Adams v. Buffalo Snowbird Company, et al.*, Vol. 1, No. 5, p. 232, N. C. I. C.

The North Carolina Legislature did not intend that Section 31, relating to specific injuries, should be "in lieu of all other compensation," as is provided for in some laws. Section 32 of the original Cannady-Haywood Senate Bill, No. 83, on file in the Secretary of State's Office, File No. 526, reads:

"In cases included by the following schedule, the incapacity in each case shall be deemed to continue for the period specified, and the compensation so paid for such injury shall be specified there in, *and shall be in lieu of all other compensation*, . . ."

Section 31 in the Compensation Law, as finally adopted, which corresponds to Section 32 of the original bill, reads;

"In cases included by the following schedule, the disability in each case shall be deemed to continue for the period specified, and the compensation so paid for such injury shall be specified therein, to wit: . . ."

The Legislature struck out the clause, "and shall be in lieu of all other compensation." Why? The Legislature saw the inadequacy of such a provision. It turned back the pages of the law, and found in Section 2 (f) that "injury" shall "include a disease in any form . . . where it results naturally and unavoidably from the accident." The Legislature realized that it was necessary to compensate not only for the potential loss of earning power caused by the loss of a foot (using a foot as an illustration), by providing one hundred and twenty-five weeks compensation for the loss of a foot in Section 31 (o), but saw the injured employee losing a foot and being unable to work during a long healing period. Industry would be exacting a severe and heavy penalty from an employee if a disease "resulting naturally and unavoidably" from an accidental loss of a foot and said employee was temporarily and totally disabled for one hundred weeks therefrom, or for the full period of one hundred and twenty-five weeks.

The employee earning thirty dollars per week would lose forty per cent of his wages during one hundred weeks and he would receive a small part of the compensation another employee would receive who was able to return to work in ten weeks. He would really be paying for the loss of his foot instead of receiving compensation. Then, there is a case where, for unusual reasons, the "stump" healed slowly. The worker would receive but little, if anything, for the loss of his foot. Also the case where the temporary total disability period extended beyond the one hundred and twenty-five weeks.

It might be said by some people that these are unusual cases, and very remote, but it is the unusual case that needs the benefit of temporary total compensation in addition to specific. The normal case is provided for in Section 31, and such an interpretation of the Law would add but little to the compensation provided.

Compensation statutes are founded upon motives of public policy, and not upon natural individual rights. The State has an interest in keeping its citizens who actually perform industrial service, from becoming paupers and objects of charity, and it is with this object in view that such statutes are enacted, construed, and enforced. Technicalities in matters of proceeding are expressly discountenanced in their enforcement. *Wyatt v. Finley*, La., 119, Sou., 469.

There is also Section 26, which provides in part that "the employer shall not be liable in damages for malpractice of the surgeon furnished by him pursuant to the provisions of this Section, but the consequences of any such malpractice shall be deemed as part of the injury resulting from the accident, and shall be compensated for as such." An unusually long period of temporary total disability might be the result of malpractice by a physician or surgeon furnished by the employer, which is contemplated in Section 26. Every case of malpractice is not so labeled, as we know that infection often results because of improper treatment. The employee would have to pay the price if he is denied temporary total disability in addition to specific. The Law was enacted to prevent "human wrecks" as the result of industry from becoming "paupers and objects of charity."

Section 38 provides that "if death results proximately from the accident and within two years thereafter," etc., that those wholly dependent shall receive compensation for three hundred and fifty weeks subject to the weekly and minimum limitations and also Section 41. It further provides for those partially dependent. If the injured employee should die as the result of an amputation of a foot compensation to his dependents would not be controlled by the specific section, Section 31 (o), for one hundred and twenty-five weeks, but would be paid for three hundred and fifty weeks, less the number of weeks paid the employee himself.

It is clear to the Commission that the injured employee and his family is entitled to as much consideration as is a widow and child; therefore, the injured employee is entitled to compensation for temporary total disability while he is unable to work and also for the specific because of the potential impairment of his earning power caused by the amputation of a member.

Section 30 also deals with partial disability, but it allows up to three hundred weeks, which is one hundred weeks less than the maximum for permanent total and one hundred weeks more than for the loss of an arm, which is the greatest amount granted for specific disability. The three hundred weeks covers both temporary total and partial disability, but gives the employe sixty per cent of the difference between his new wage and his old wage, if the new wage is less.

The Supreme Court of Montana in the case of *Dosen v. East Butte Copper Mining Co.*, 78 Mont., 579, 254, 880, said:

"If a man who has a broken leg is confined to his bed for a period of two months, during that time he is temporarily totally disabled. If the leg is so badly injured that a good recovery never ensues, or, if complications from the injury set in so that he never makes a good recovery, he then has a permanent partial disability. The period of total disability has succeeded. Here are two classes of disabilities, one succeeding the other. When the total disability ends, and the extent of the partial disability are questions of fact, to be decided in the first instance by the Industrial Accident Board."

The following excerpts are taken from *Kansas City Structural Steel Company v. Petty*, (Supreme Court of Okla., 1930) 284, 47:

In *Smith & McDannald, et al., v. St. Ind. Com.*, 133 Okl., 77, 271, 142, it was held:

"Under Section 7290 C. O. S., 1921, as amended by chapter 61, section 6, Session Laws of 1923, the State Industrial Commission may make an award for temporary total disability as a specific injury, notwithstanding that the same may subsequently become a permanent partial disability for which compensation may be awarded."

(4) In *Thompson v. State Ind. Commission*, 138 Okl., 166, 280, 597, it is held:

"The Workmen's Compensation Act of this state (Compiled Oklahoma Statutes 1921, sections 7282-7340, inclusive, as amended) must be construed as a whole, and this law, enacted for the protection of labor, should be liberally, rather than strictly, construed, both by the Industrial Commission and the Supreme Court, so as to give effect to the intention and purpose of the law.

"Where the State Industrial Commission makes an award for permanent partial disability, without considering or passing upon the question of temporary total disability, and the record discloses that petitioner was temporarily totally disabled for a period of time, said award will be reversed on review by this court.

In *Dosen v. East Butte Copper Co.*, 78 Mont., 579, 254, 880, quoted from with approval in *Smith & McDannald v. State Ind. Com., supra,* a number of authorities are cited holding in effect that the "In lieu" clause, similar to that in section 7290, *supra,* means that the compensation allowed for a specific injury, such as the permanent total loss or a permanent partial loss of the use of a member, for which compensation is allowed for a definite number of weeks, is in lieu of all other compensation for that particular injury, and does not prevent allowance of compensation for temporary total disability caused by the same or separate injuries growing out of the same accident.

For other cases discussing this question, see *Cherokee Sand Company v. T. O. Greene*, 152 Tenn., 412, 277 S. W., 905; *Jack v. Knowville Fertilizer Co.*, 289 S. W., 500; *Jones v. Georgia Casualty Co.*, 117 S. E., 467; *Addison v. Ward*, Mich,—174 N. W., 149; *Franco v. Schowhorn Co.*, 93 Conn., 13, 104 Atl., 485; *Wrenn v. Conn. Brass Co.*, 112 Atl., 683. In *Nitran Co. v. Court of Common Pleas* (1913), 84 N. J. L., 243, 86 Atl., 435, it was decided that compensation may be awarded for both temporary total and permanent partial disability as the result of the same accident. See L. R. A., 1916 A, 254.

In the above styled case, the Commission finds that John Rice lost one-half of the second finger of his left hand for which he is entitled to fifteen weeks; for one-half of his third finger he is entitled to ten weeks, and for one-half of the fourth finger, seven and one-half weeks.

The Commission erred in finding temporary total disability for only four weeks in the original decision. Both parties admitted before the full Commission that it should have been seven weeks and two days.

The instant case is illustrative of the issue involved in the reasoning of the full Commission. There is no evidence to show whether the temporary total disability was the result of the amputation of any one of the fingers or the result of all, but for the sake of discussing this case and its sole issue, let us assume that the plaintiff had lost one one-half of his fourth finger, for which he is entitled to seven and one-half weeks and that he had had the same amount of temporary total disability as the result of said accidental injury, or seven weeks and two days. Plaintiff would have received but one and one-half day's compensation for the actual loss of one-half of the fourth finger, or $3.23, as his compensation was $15.08 per week. (The Commission in figuring compensation divides the week by seven days.) On the other side of the ledger plaintiff could charge the loss of forty per cent of his wages during seven weeks and two days, or $43.94, having a net loss of $40.71. In other words, he would have paid in direct loss of wages, $40.71, for the privilege of losing one-half of his fourth finger. The compensation law is intended to be remedial, but such an interpretation would not be. There is also the worker who makes more than $30.00 per week. He would receive an even smaller percentage.

Even if the employee should be able to return to work the next day. Section 31 says, "disability shall be deemed to continue for the period specified." Thus, it is evident the Legislature had in mind paying the employee for the loss of a member or loss of use of a member and assumed that the employee would be placed at a disadvantage in securing employment in the open labor market.

Also, if the loss of said member should totally disable an employee for his regular vocation, he would still be entitled to only the specific plus the temporary total.

For temporary total disability the plaintiff is entitled to receive sixty per cent of his average weekly wage for seven weeks and two days. In addition to this, for the specific loss of parts of the fingers as per schedule of injuries set out in Section 31, the plaintiff is entitled to receive sixty per cent of his average weekly wage for a period of fifteen weeks to cover the loss of one-half of the second finger; for a period of ten weeks to cover loss of one-half of the third finger; and for a period of seven and one-half weeks to cover the loss of one-half of the fourth finger.

[Docket No. 183]

GRANISON KENNEDY, Employee, Plaintiff, v. COLLINS GRANITE COMPANY, INC., Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed March 14, 1930

TEMPORARY TOTAL AND SPECIFIC.—Under Section 29 Compensation is payable during total disability and, in cases of amputation of member, upon termination of total disability the disability will be deemed to continue thereafter for periods provided in Section 31.

Hearing before the Full Commission, February 24, 1930, at Raleigh, N. C.

W. C. Gaither appeared for the Maryland Casualty Company.

Opinion for the full Commission by DORSETT, Commissioner.

An award in this case was issued February 5, 1930, and on February 8, the carrier-defendant gave notice of appeal for the purposes of protecting its rights as stated in a letter of February 8. However, upon receipt of due notice and an appearance being entered before the Full Commission on February 24 by Mr. W. C. Ginter, no argument or brief has been submitted. The Full Commission has examined the evidence taken before Commissoner Wilson on January 13, 1930, and the findings contained in his opinion filed February 4 are sustained by the greater weight of the evidence. The findings contained in the opinion of February 4 are adopted as the findings of the Full Commission, and in addition thereto the further definite finding is made: That the plaintiff was justified in refusal of the medical aid tendered by the employer.

In support of the Award directed by Commissioner Wilson in his opinion of February 4, 1930—which award is adopted and affirmed—and in support of this Award the full commission has adopted the following.

Conclusions of Law

The sole question presented since the Commission has found that the refusal of the medical attention was justified and therefore compensation could not be denied under Section 25 of the Act, revolves upon the construction of Sections 29 and 31 of the Act where temporary total disability exists in addition to an amputation of a member. Sections 29 and 31 were construed in the case of Adams v. Buffalo Snowbird Co. in an opinion by Commissioner Dorsett, appearing at page No. 232 of the opinion of the Commission. Before this opinion was filed it was approved by the Full Commission and the conclusions therein expressed are adopted by the Full Commission in support of its conclusions in the instant case. In addition to what was therein stated, the Commission deems it pertinent to add the following.

The Legislature had before it at the time of adopting the Act, a draft of an act following the Virginia statute, which draft in Section 31 contained the expression "and shall be in lieu of all other compensation." This draft is in the files of the Secretary of State and the Committee substitute which was adopted and now in effect does not contain the expression quoted. An examination of the various acts of different States having compensation laws discloses many different treatments of the so-called scheduled injuries.

Five States provide no compensation for schedule injury. Six States specifically provide that schedule payments are "in addition to" other compensation. Another Group provide for specific injuries but do not state whether "in addition to," "in lieu of," or if "disability should be deemed to continue." Three States provide for specific injuries compensation as "that named." Eleven States provide that schedule payments are "in lieu of." Three States similar to the North Carolina Act provide that in schedule injuries "the disability shall be deemed to continue." Prior to amendment to its act, the New York act read similar to the North Carolina act. In *Days v. Trimmer & Sons*, 176 App. Div., 124, 162 N. Y. Sup., 603, it was held that consecutive and not concurrent awards may be made for temporary total disability and various partial disabilities, supporting our construction herein.

In *Wagner v. American Bridge Co.*, 158 N. Y. Supp., 1043, it was held that the schedule enumerations do not profess to be exclusive.

In the case of Smith and McDonald, 271 Pacific Reporter, 142, the Oklahoma Supreme Court quoted as follows:

"The Supreme Court of Montana, in the case of *Dosen v. East Butte Copper Mining Co.*, 78 Mont., 579, 254 p., 880, said: 'If a man who has a broken leg is confined to his bed for a period of two months, during that time he is temporarily totally disabled. If the leg is so badly injured that a good recovery never ensues, or if complications from the injury set in so that he never makes a good recovery, he then has a permanent partial disability. The period of total disability has ceased and a period of partial disability has succeeded. Here are two classes of disabilities, one succeeding the other. When the total disability ends, and the extent of the partial disability, are questions of fact, to be decided in the first instance by the Industrial Accident Board,' and concluded the opinion:

"Under our statute and the schedule, *supra*, the employee is entitled to compensation for temporary total disability, and if the jury is of such a nature that when the period of total disability has ceased and partial disability has succeeded, one succeeding the other, are all questions of fact to be determined by the State Industrial Commission.

"Petitioners contend that the following paragraph of our statute, 'The compensation for the foregoing specific injuries shall be construed to mean the loss of a hand or foot or other injuries so designated.' With this construction we cannot agree. This section begins with the following statement: 'The following schedule of compensation is hereby established,' and under this schedule of compensation is temporary total disability, so the commission's award for temporary total disability is not contrary to law, and should be affirmed.

"All Justices concur."

Having before it a draft of an act providing "in lieu of," and striking this phrase out before adopting the act is sufficient of itself to convince one that the legislative intent was not to make the schedule compensation provided in Section 31 "in lieu of"—and the expression, "deemed to continue," must have some meaning. Disability is defined as incapacity because of injury to earn wages. If there exists an actual total disability by reasons of the injured employee's inability to resume work because of the so-called healing period not having terminated, certainly it needs no legislative expression to show the physical condition of the injured employee; he is actually disabled. After the healing period has terminated in case of a person losing a fourth finger as herein, he is not only totally disabled during the healing period but the act says that his period of total disability because of the "loss of" his fourth finger will be deemed to continue thereafter for fifteen weeks. By its plain and unequivocal terms the act says that during total incapacity for work the employee shall receive 60 per cent of his average weekly wage during such total disability (Section 29), and if the fourth finger is lost the disability shall be deemed to continue for fifteen weeks (Section 31). Therefore, regardless of the interpretation placed upon the statutes of other states the Commission can arrive at but one logical conclusion as to the legislative intent which is that the scheduled awards in Section 31 are in addition to payments for temporary total disability benefits subject to the maximum prescribed in the act.

For the reasons assigned the award made on February 5, 1930, is approved and affirmed by the Full Commission.

[Docket No. 124]

JOHN PROPST, Deceased, Employee, Plaintiff, v. CITY OF HIGH POINT, Employer, and HARTFORD ACCIDENT AND INDEMNITY COMPANY, Carrier, Defendants

Filed March 15, 1930

FAILURE TO REPORT ACCIDENT.—Where employer's rights have been prejudiced by failure to report accident, Compensation for injuries resulting in death denied.

TETANUS.—Failure to report occurrence of nail puncture wound until after death from tetanus and too late to administer Tetanus antitoxin serum prejudices employer's rights.

Hearing before Commissioner DORSETT at High Point, N. C., February 17, 1930, and hearing before Representative Commissioner Price at High Point, December 10, 1930.

Plaintiff represented by *Walser & Casey*, Attorneys, of High Point, N. C., and *O! R. York* of High Point, N. C.

Defendants represented by *A. W. Sapp*, Greensboro, and *James W. Vest* of Greensboro, N. C., Adjuster for the Hartford Accident and Indemnity Co.

Opinion by DORSETT, Commissioner.

Statement of the Case

Two hearings were had in this case, the first before Deputy Commissioner E. W. Price, and the second before Commissioner Dorsett. The facts disclosed by the record in these two hearings are as follows:

John Propst, deceased, was employed by the City of High Point at an average weekly wage of $16.50 at the time of his death, and had worked for the city for about two years. On or about August 20 or 21, while working at Mechanicsville, the deceased stuck a nail in his foot, and at the suggestion of the negro truck driver, poured kerosene oil on the wound. On the following Thursday, August 22, while loading some garbage on a truck, the container fell back on him, and injured his chest and hand; some of the garbage went in his mouth. That afternoon he went to a doctor, and the following day he advised Mr. Shiplett, who was in charge of the sanitary work for the city, that he had to quit work and go to the doctor; that he had hurt himself the day before putting some garbage on the truck. The deceased went home and to bed, and remained there until August 29, at which time he was admitted to the Burrus Clinic. Dr. Burrus testified that he was then "as stiff as a board." He remained in the hospital until Saturday, August 31, at which time he died. Dr. Burrus testified that his death was caused by tetanus.

The testimony of the various witnesses who were called to prove the two accidents was substantially the same, except that Mr. Shiplett testified that he had no knowledge or notice of the nail wound. The testimony of Brown and Bingham was practically identical, each testifying that the deceased had sustained two accidents, and that they had seen the nail wound.

Dr. Burrus's evidence is substantially as follows:

The deceased was admitted to the Clinic on August 29, 1929, at which time he was "as stiff as a board," and died August 31. He had previously been treated by some colored doctor. At the time he was admitted he had some open wounds on his hand, and some which had a scab on them. The doctor is unable to state where the deceased got the infection, but tetanus usually enters through a wound. We find the following in the doctor's testimony:

Q. If this Court should find that on the second Thursday prior to the death of John Propst that while employed he stuck a nail in his foot; that on Friday afternoon on the second Friday prior to the day of his death that while handling a trash container that he received a wound in his right hand; that then the following day he was taken sick and gradually grew worse until he was brought to the hospital as you examined; what in your opinion caused his death?

(Objection—Mr. Price: Proceed—Exception.)

A. I would think that the tetanus was conveyed to the body from the nail wound in the foot.

Q. Do you know whether or not you found any other cause for it?

A. No other cause. The tetanus must be admitted to the body through an abrasion. With this exception, that sometimes in surgical operations where catgut is used, and where the catgut has not been properly sterilized, you may get tetanus into the system that way. It is an organism that may be transmitted to the body from soil that is very rich in manure, some guanos, and things like that. I never saw a case of tetanus that was not admitted any other than that way."

The doctor further testified that the death was the result of tetanus. He stated that there was no evidence of a nail wound at the time the deceased was brought to the hospital, but that nail wounds often close so as to not be visible within 24 to 36 hours, and that there is less danger of tetanus infection if the wound remains open and drains. The average time between the infection and the hardening of the muscles is between 11 and 21 days, although some cases have occurred in as short a time as two days, and some in as long a time as seventy days. Both of those are unusual. The time is dependent on the soil conditions, and the average around the community in which the deceased lived and worked, according to cases seen by the doctor, is around 17 to 21 days, somewhere around three weeks.

At the second hearing on February 17, Bessie Anderson stated that the shoes which the deceased wore had holes in them.

From all the evidence the Commission arrives at the following

Findings of Fact

1. The deceased was regularly employed by the City of High Point at the time of his death at an average weekly wage of $16.50.

2. That the parties plaintiff and defendant are bound by the provisions of the Workmen's Compensation Act, neither having rejected the same, and

the risk of the City of High Point is covered by the Hartford Accident and Indemnity Co.

3. On or about August 20 or 21 the deceased suffered an accident arising out of and in the course of his employment, namely, a nail puncture.

4. On or about August 23, the deceased suffered a second accident arising out of and in the course of his employment, which resulted in various abrasions of his right hand and a strain in his chest and back.

5. As a result of the accident of August 20 or 21, 1929 the plaintiff contracted tetanus, from which he died on August 31, 1929.

6. The defendant employer received no notice of the injury as required by the Workmen's Compensation Act, and as a result of such failure to give the proper notice the rights of said defendant employer have been prejudiced within the meaning of section 22 of the act.

Upon the above findings of fact the Commission bases the following

Conclusions of Law

Under the evidence of the various witnesses it seems clear that the deceased suffered two accidents both of which unquestionably arose out of and in the course of his employment. It is quite possible that the tetanus could have developed from either of the wounds, but there seems to be no doubt, under the evidence, that it resulted from the nail puncture. Dr. Burrus testified that tetanus would be more likely to follow a wound which closed immediately than one which remained open and drained; and furthermore that the nail puncture was closed so as not to be visible at the time the doctor examined him, whereas some of the wounds and abrasions on his hands were open at that time and the rest apparently recently healed. From the above-quoted excerpt from Dr. Burrus' testimony it is clear that under the facts in this case, the doctor is of the opinion that the death of the deceased was the result of tetanus contracted because of the nail puncture. The hypothetical question propounded by counsel, which in the opinion of this Commission is competent, correctly states in substance the events which this Commission finds transpired previous to the appearance of the disease. The witness was not called upon to decide any fact concerning the accident itself, but only what the result of the accident was. The doctor states that in his opinion the tetanus was the result of the nail puncture. Moreover, it is a matter of common knowledge that nail punctures may be and frequently are the source of tetanus infection. Particular attention should also be given to the second question above quoted: "Q. Do you know whether or not you found any other cause (i.e. other than the nail puncture) for it? A. No other cause." From the doctor's testimony we believe, and with ample reason, that the tetanus resulted from the nail wound, inasmuch as the doctor testified (1) That in his opinion the nail wound was the cause of the tetanus, and (2) That he found no other cause for the tetanus. Furthermore the doctor stated that the organism causing tetanus is often found in soil, and we find in the record that the shoes which the deceased wore had holes in them, causing his foot to come in contact with the ground. Because of the concurrence of all of those circumstances there is no doubt that the tetanus resulted from the nail puncture received on August 20 or 21.

Had nothing else appeared the claimant would have been entitled to compensation under the law, but in view of the fact that proper notice not given such is not the case. Section 22 of the Workmen's Compensation Act provides: "Every injured employee or his representative shall immediately on the occurrence of an accident, or as soon thereafter as practicable give or cause to be given to the employer a written notice of the accident, and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this act prior to the giving of such notice unless it can be shown that the employer, his agent or representative had knowledge of the accident or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity, or the fraud or deceit of some third person; but no compensation shall be payable unless such written notice is given within thirty days after the occurrence of the accident or death unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby."

In the case at bar, the defendant employer, according to the evidence, had no notice whatsoever, written or otherwise, of the nail wound prior to the time of the hearing on December 10, some three and one-half months after the injury. It was not shown that there was any reason whatsoever for failure to give proper notice. The deceased returned to the place of business of the employer and talked with Mr. Shiplett, under whom he worked, after the injury. Indeed he advised Mr. Shiplett of the injury he sustained on August 23, but at no time did he mention the prior injury, nor did he have anyone else give notice of the accident to Mr. Shiplett. There is clearly no reason why he should not have given notice to him since he talked with him after the accident occurred. Section 22 specifies that notice shall be given "immediately or as soon as practicable." This he did not do. Furthermore he did not at any subsequent time give notice, nor did he cause it to be given, nor did his representative or dependents, after his death, give notice within thirty days of the accident. The compensation law provides that no compensation shall be paid unless notice is given within thirty days if no reason is shown to the satisfaction of the Industrial Commission why such notice should not have been given. No notice was given, written or otherwise, for a period of over ninety days, and no reason at all is shown why such notice should not have been given. Furthermore this failure to give notice has prejudiced the rights of the employer to a very serious degree. Had notice been given immediately as specified by the act, medical attention might have been furnished, and in all probability no ill results would have followed the nail wound, as it is the custom among doctors in the treatment of nearly all wounds, and almost without exception in the treatment of nail wounds, to give tetanus antitoxin. The law provides that notice shall be given; the purpose of this is to protect the rights of the employer, and to entitle a claimant to compensation after failure to give notice he must show that the rights of the employer have not been prejudiced by such failure. Here the rights of the employer have clearly been prejudiced. It is true that the claimant may not have known that he was supposed to give notice; perhaps it was not impressed upon him as it should have been; but it is an old and well-settled principle of the law that "ignorance of the law is no excuse, and ignorance of a fact necessary to prevent violation of the law is no excuse." Compensation is therefore denied and the case is dismissed.

Since the case is clearly not compensable, there is no necessity for discussing the question of dependency involved in the second hearing of this case, nor is there any need of going into the contentions of the defendants as to the parties to this action. However, it might be noted that letters of administration were granted to C. F. Williams on December 10, and copy of same filled with the Industrial Commission.

[Docket No. 97]

H. W. BRADY, Plaintiff, v. NELLO L. TEER, Employer, AMERICAN LIABILITY INSURANCE COMPANY, Carrier, Defendants

Filed March 20, 1930

PYELITIS.—Where disease does not result naturally and unavoidably from an accident, Compensation for disability from disease denied.

Hearing at Lexington before Deputy Commissioner E. W. PRICE, December 10, 1929, adjourned to Raleigh before same on January 10, 1930, and adjourned to Lexington before MATT H. ALLEN, Chairman, on January 25, 1930.

Plaintiff appeared in person.

Defendants represented by *C. H. Taylor*, Agent for American Liability Insurance Company.

Opinion by ALLEN, Chairman.

The transcript of the evidence taken before the Deputy Commissioner on December 10, 1929, and also on January 10, 1930, has been duly certified to the Commission as required by the Statute. Upon all the evidence, the Commissioner makes the following

Statement of the Case

On July 29, 1929, the plaintiff, while in the employ of defendant, strained his back; thereafter he went to Dr. Plummer, who prescribed for him. This was reported to the employer some days later. He worked several days thereafter and on August 5 was admitted to the Davidson Hospital in Lexington. Dr. J. A. Smith diagnosed the condition from which plaintiff was suffering at that time, and during his stay in this hospital until August 30, as lobar pneumonia and pyelitis. Upon leaving the Davidson Hospital to consult a genitourinary specialist, plaintiff was admitted to Rex Hospital, Raleigh, N. C. Dr. H. C. Campbell attended him and called in Dr. C. O. Abernethy, who diagnosed plaintiff's trouble as a gluteul abscess. Dr.

Abernethy did not examine the urine. He assisted Dr. Campbell in the operation of opening and draining of the abscess.

Since this date the plaintiff has had a series of abscesses, totaling eleven.

The plaintiff at this time has to use crutches, and is partially paralyzed in his right leg.

The medical testimony varies widely upon the question as to whether or not plaintiff's condition was and is the result of an injury.

The two physicians who treated plaintiff upon his first admission to the hospital, gave as their opinions that the condition of plaintiff was not the result of the injury, while two other physicians, one licensed, and the other non-licensed, gave as their opinion that the injury on July 29 could have produced the conditions which followed, to wit: pyelitis, lobar pneumonia, and gluteal abscesses.

The burden is upon the plaintiff to establish, by the greater weight of the evidence, some connection between the alleged accident and his present condition.

Dr. J. A. Smith testified among other things, as follows:

Q. What diagnosis, if any, did you make at that time?

A. Of course, from the lung findings I made the diagnosis of left lobar pneumonia.

Q. Did you examine his kidneys?

A. I examined the urine and the blood.

Q. What did your urinalysis show?

A. A heavy purulent discharge with a heavy trace of albumen and abundant hyaline and granular casts.

Q. Have you an opinion as to how long the kidneys had contained albumen and the casts?

A. I couldn't tell; the blood examination on the next morning showed a count of 4,960,000 red blood; white blood count 14,000; hemoglobin, 95; polymorphocellular, 83; small mononucleus, 15; large mononucleus, 2.

Q. What was the condition of his blood, stated in everyday parlance?

A. He had a leukocytosis in the white blood cells; they had increased from 7,000 to 14,000.

Q. What was the cause of that?

A. It was the septic condition. It could have come from the pus from the pneumonia or could have come from the pus in the urine.

Q. It could have come from the pus in the urine or from the pneumonia?

A. Yes sir.

Q. In your opinion what caused the pus condition in the urine?

A. Infection.

Q. An infection caused by a germ?

A. Yes sir.

Q. In other words a constitutional diseased condition?

A. Yes sir.

Q. Could that diseased condition be the cause of the pneumonia, or the result of the pneumonia?

A. It could be; he could have both and it could be the result of the pneumonia. It would not think the pneumonia would be the result of pus; I would not make that statement. It is very rarely ever that it does.

Q. Did you find the urine moderately or largely filled with pus?

A. Most of the times it was heavy; at times it improved under treatment, but most of the time it was never clear while he was in the hospital.

Q. Have you any opinion as to how long this pus condition had been in the urine prior to the time of your examination?

A. No sir.

Q. Would this pus condition in the kidneys have caused pain in the lumbar region?

A. Yes sir; it would have caused rigidity, pain, fever, nausea and diarrhea. Those are also the symptoms of pyelitis.

Q. Pyelitis is a condition which may develop irrespective of strain or injury?

A. Yes sir.

Q. Is it a constitutional diseased condition?

A. Yes sir.

Q. Did he make any statement to you at the time you were treating him of having been injured or strained?

A. Not for about ten days after his admission. I knew nothing of any injury until the tenth day.

Q. Had anybody been to see him during that ten days?

A. It looked like he was going to die and his mother came up in about a week. She was at the beach and we made several attempts to call her and called through a brother in Durham. She came up and she mentioned it; that was the first I had heard of any injury. I told her that he had told me nothing about an injury. Then I went to him and did get a history of an injury.

Q. What kind of an injury did Mr. Brady tell you he had sustained?

A. When I asked him about an injury he said he was stepping off of a road tractor, or scraper, and his foot slipped and he was holding to a lever and he just got a jerk. He said he felt something pull in his side.

Q. Have you an opinion satisfactory to yourself as to whether or not this pull or jerk of the kind he described, would have produced this pustular urine, and trouble with kidneys, and brought on pneumonia?

A. We do have pneumonia following injuries, but they are usually injuries to the chest. I can't conceive of a strain in the lower part of the abdomen setting up a pneumonic chest. Neither can I conceive of an injury of that kind setting up pyelitis.

Q. To what do members of the medical profession attribute the cause of pyelitis?

A. The first cause, in my opinion, if my opinion is not objectionable, is constipation. The infection gets in from the lymphatics to the kidneys through the wall of the intestine. That causes cystitis; this is from the bladder upwards. It is usually a meta-statical infection.

Q. Do abscesses follow the appearance of pyelitis?

A. Any long septic condition will be followed by abscesses.

Upon consideration of all of the evidence, the Commissioner finds the following

Findings of Fact

1. That the plaintiff, on July 29, 1929, while in the employ of Nello L. Teer, sustained an accidental injury that arose out of and in the course of his employment.

2. That said employment was subject to the operation of the Workmen's Compensation Act, and the American Mutual Liability Insurance Company insured defendant Nello L. Teer's compensation liability.

3. That the plaintiff's average weekly wage was in excess of $30.00.

4. That the plaintiff sustained no disability because of the above mentioned accidental injury.

5. That plaintiff's condition since about August 1, 1929, is the result of a constitutional disease not attributable to, nor a result naturally and unavoidably from the said accident.

Conclusions of Law

The plaintiff's condition upon entrance to the Davidson Hospital is shown by the greater weight of the evidence to be attributable to acute pyelitis—a disease caused by infection of the kidneys from the lumphatics through the walls of the intestines—ordinarily caused by constipation.

An injury, to be compensable, must be the result of an accident arising out of and in the course of the employment, and not include a disease in any form, except where it results naturally and unavoidably from the accident.

The Superior Court of Louisiana in *Landry v. Phoenix Utility Company*, 124 Sou., 623, a case resulting in death, but otherwise similar, said:

"To the *untutored* mind of the Court it would appear that a severe injury resulting in the fracture of two ribs, one of them in two places, such as was suffered by the deceased, Landry, would have some causal relation, or would at least have contributed to his demise, which occurred about two months after the injury, particularly since the testimony is to the effect that he had previously enjoyed good health, and was not known to complain of any physical illness prior to the accident. This conclusion to the lay mind would seem most reasonable, but we are not privileged to indulge our impressions in a matter so technical, in view of the expert testimony in the record, which clearly preponderates to the effct that duodenal ulcers, the admitted cause of Landry's death, could not be produced as a result of external trauma. The expert medical testimony also preponderates to the effect that the trauma was not a contributing cause, some of the physicians advancing the view that the nephritis, which the autopsy disclosed as present, was most likely an important factor in the result, because, as Dr. Martin puts it, "If there is anything in God's world that will lower a man's resistence, that will do it."

For the reasons assigned, the claim is denied, and an award will issue, dismissing the claim.

[Docket No. 88]

PAUL COLLINS, Employee, Deceased, et al., Plaintiffs, v. WAYNE TIRE COMPANY, Employer, TRAVELERS INSURANCE COMPANY, Carrier, Defendants

Filed March 21, 1930

Average Weekly Wages.—Paragraph 2, Subsection (e) of Section 2 applies only to employees and not dependents and personal representatives.

Partial Dependency.—Not presumed, but fact in each case governs.

This hearing was held before J. Dewey Dorsett, Commissioner, at Goldsboro, N. C., December 3, 1929.

Plaintiff represented by *Kenneth C. Royall*, Attorney, Goldsboro, N. C.
Defendants represented by *Biggs & Broughton*, Attorneys, Raleigh, N. C.

Opinion by Dorsett, Commissioner for the Full Commission.

This was an Appeal from Award and Findings of Commissioner Dorsett to the Full Commission.

The record contains the following Findings of Fact:

1. The deceased sustained a fatal accident that meets with the requirements of Section 2 (f) of the Compensation Law.
2. The insurance carrier is the Travelers Insurance Company, and that company has intervened as a party defendant.
3. The average weekly wage was $18.21.
4. The parents of the deceased, Jesse L. Collins and wife, are found to be partially dependent on the earnings of the deceased, and this dependency is found to be fourteen dollars per week.

Upon the above findings, award was issued, providing for the payment to Jesse L. Collins and wife the sum of $8.39, this being sixty per cent of $14.00, for a period of 350 weeks.

The Plaintiffs appealed upon the following grounds, viz:

1. That Commissioner Dorsett, in making said award, failed to require or recommend that the Wayne Tire Company and Travelers Insurance Company bring suit against the Carolina Power & Light Company, by reason of said death, said suit to be for the joint benefit of said employer and carrier in the first instance, and for the benefit of Paul Collins's Administrator in the second instance.
2. That Commissioner Dorsett did not make an Award of $6,000.00, as provided in Sections 29 and 41: that Commissioner Dorsett, in determining the average weekly wage failed to give effect to the second paragraph of Section 2 (e), and that no consideration was given to the fact that the deceased was on an increasing wage scale.
3. That Commissioner Dorsett failed to find that the "average weekly wages" amounted to $30.00 per week, as this clause is defined in the Act.

4. That Commissioner Dorsett failed to find a case of full dependency.

5. That Commissioner Dorsett fixed compensation at only $8.39 per week.

6. That Commissioner Dorsett failed to order the payment of the commuted value of the installments.

7. That Commissioner Dorsett imposed upon the claimant half of the costs of the hearing.

The first exception is without merit in that the employer and insurance carrier are subrogated by Section 2 of the Act to any rights of the deceased, or his personal representative, and any amount collected or recovered in excess of the amount paid by employer or insurance carrier shall be held for benefit of employee, or the person entitled thereto.

Exception 2 is settled by the decision in the case of *Pendleton, Admr., v. B. & N. Motor Company,* filed February 4, 1930, and affirmed by the Full Commission on February 28, 1930.

Exceptions 3, 4, and 5, will be considered together.

It appears from the evidence that the deceased, at the time of his death, was nineteen years of age; that he was living with, and in the home of, his parents, along with four other minor children, of the ages of twelve, nine, seven, and one; that the deceased and his father supported the family; that the weekly contribution of deceased was at least $10.00 per week, and as much additional as was necessary at the end of each week; that he frequently bought clothing for his brothers and sisters, and paid household bills when necessary; that he retained for his personal use usually as much as $5.00 per week, sometimes more and sometimes less; that out of the portion retained he bought his wearing apparel, and such luxuries as cold drinks, cigarettes, and theatre tickets; that at the time of his death his salary was $21.90 per week, said salary having been increased a short time before his demise.

The plaintiff contends upon this evidence that while his average weekly wages for the 52 weeks preceding death were $18.21, the Commission should take into consideration his prospective increase in earning power, measured by his past record, and that the Commission should find the average to be $27.00 or $30.00, instead of $18.21.

It is further contended that inasmuch as the deceased was under twenty-one years of age, his entire earnings belonged to his parents, and are presumed to go to the support of the family; that any amount retained by the minor for his personal use should be treated as a gift from the parents, whose duty it was to feed and clothe him, and that the Commission should therefore find that the parents were wholly dependent upon the minor regardless of how the wages were distributed among them.

The legislature has definitely fixed the rule for determining the average weekly wage of employees, and the Trial Commissioner has applied the rule set out in sub-section (e) of section 2 in the finding herein. No other rule is permitted, unless for exceptional reasons the rule set out in the first paragraph of sub-section (e) would be unfair, either to the employer or employee, and in such case the Act authorizes the Commission to adopt such other rule as will most nearly approximate the amount which the injured employee would be earning, etc. The Commission does not understand a raise in wages as such an exceptional happening or reason as will justify a departure from the general rule, where there is a continuous record of earnings for the past 52 weeks.

It must be conceded that where there has been no emancipation, the father is entitled to the wages of the son, who is a minor, and may recover such wages in an action at law. *Daniel v. R. R. Company*, 171 N. C., 23; *Bognie v. Power Co.*, 157 N. C., 503.

It is also true that the father is bound to support his minor child in the station of life in which they live, if he can do so. *Nowell v. Solomon*, 167 N. C., 558.

The Commission recognizes the force of the plaintiff's position, especially in this case, where the minor was one of the main supports of the family. But, while the Act conclusively presumes an unmarried child under eighteen to be wholly dependent upon the parent, there is no presumption that the parent is dependent upon the child, and in the latter case the question of dependency must be determined in accordance with the facts as they are at the time of the accident. This being so, and the purpose of compensation being to reëstablish the dependents up to 60 per cent of the dependency, we are constrained to follow the findings and judgment of the Trial Commissioner, if his percentage of dependency is correct. All of the evidence tends to show that the deceased retained from five to seven or eight dollars per week for his personal use. The mother testified that he always gave her $10.00, and at times more, as the exigency demanded, and that he frequently bought clothes for the younger children, and paid telephone bills, etc. The Trial Commissioner, upon this evidence, added to the $10.00 regular contribution an average of four dollars $4.00 making the total dependency $14.00, which we find to be liberal under all the circumstances.

The findings and award of Commissioner Dorsett are hereby affirmed, and his Findings and Award are adopted as the Findings and Award of the Full Commission.

NOTATION.—Commissioner Wilson dissents from the holding that a raise in wages is not such an exceptional reason as will justify a departure from the general rule.

[Docket No. 387]

WILLIAM SNUGGS, Employee, Deceased, Plaintiff, v. CAROLINA COAL AND BY-PRODUCTS CO., Employer, Non-insured, Defendant

Filed March 29, 1930

WILLFUL.—Willful violation of rules must be of rules approved by Commission. Willful misconduct or refusal to comply with statute duty involves more than moral blame and conduct of quasi criminal nature, not ignorant failure to comply with statute.

NON-INSURER.—Deposit of commuted amount of death award required to be made into office of clerk of Supreme Court where no insurance provided.

Hearing before J. DEWEY DORSETT, Commissioner, March 22, 1930, at Pittsboro, N. C.

The Plaintiff was represented by *H. C. Turner*, Attorney of Albemarle, N. C.

The Defendant was represented by *T. J. McPherson*, Attorney of Sanford, N. C.

Opinion by DORSETT, Commissioner.

Statement of the Case

The claimants in this case, who are the widow and minor children of the deceased, are claiming compensation for the death of their husband and father. The defendant, through its counsel, denies liability on the ground that the deceased willfully intended to commit suicide. The further defense is that if it should be found that the deceased is entitled to compensation, that the amount of compensation should be reduced 10 per cent because the deceased failed to use safety appliances, etc., as required by the compensation law.

The defendant-employer is operating under the terms of the compensation act, but has not complied with the act with respect to providing compensation insurance, or meeting the requirements of a self-insurer.

Upon all the evidence in the case, the Commissioner makes the following

Findings of Fact

1. That the deceased William Snuggs, on January 14, 1930, while regularly employed by the defendant Carolina Coal and By-products Company, died as a result of an injury by accident that arose out of and in the course of his employment.
2. That the deceased, his dependents, and the defendant are bound by the provisions of the North Carolina Workmen's Compensation Act; neither the deceased nor the defendant having rejected the same.
3. That the defendant has not provided the insurance required by the Workmen's Compensation Act.
4. That the dependents have elected to accept the compensation benefits provided by the Act.
5. That the death of the deceased was not the result of any willful failure to use a safety appliance; nor willful breach of any rule or regulation adopted by the employer and approved by this Commission; nor a willful intent to take his own life.
6. That Jane Snuggs, widow; and Young Snuggs, aged 4, and Mae Frances Snuggs, aged 2; minor children of the deceased, were wholly dependent upon the deceased at the time of the accident for their support.
7. That the average weekly wage of the deceased was $18.00.
8. That Jane Snuggs is not mentally competent to be entrusted with the compensation due her and her minor children.

Upon the foregoing findings are based the following

Conclusions of Law

All of the evidence tended to show that the death of the deceased by asphyxiation was the result of an accident that arose out of and in the course of the deceased's employment. The defendant contends that the amount due as compensation should be reduced 10 per cent for willful violation of orders of the deceased's foreman, as well as willful violation of safety rules, and that compensation should even be denied because of the willful intent of the deceased to kill himself.

These contentions of the defendant are made under Section 13 of the Compensation Act. Under this Section the burden is placed upon the defendant to sustain its position for forfeiture. The defendant has not sustained this burden. The evidence tends to show that on the day of the accident, the deceased with a pick struck the thin wall separating the room in which he was at work from a room that had not been opened for some time and was filled with gas. There was an open hole in the wall that the defendant had struck, and which had been filled with brattice cloth; and according to the foreman's statement he had ordered the deceased to leave the room. Later, the deceased became overcome with gas and called to a fellow worker for help. The defendant contends that the deceased deliberately knocked the hole through the thin wall into the room containing the poisonous gas for the purpose of committing suicide because of family troubles.

There is not sufficient evidence to sustain this contention, nor is [there any competent evidence tending to show that the gas could not have escaped through the hole that had been stopped by brattice cloth, there being no eye witnesses to the occurrence.

As to the contention of willful violation of safety rules, it will be observed that the statute requires this willful violation to be a violation of rules or regulations adopted by the employer and approved by this Commission. At the outset allow me to state that no rules or regulations have been submitted to the Commission by this employer for approval. Further, the evidence tended to show that the defendant had no safety devices to be used, and no first-aid stations, gas masks, or other provisions looking towards the safety and protection of its employees, are provided although this mine is notorious for the hazardous conditions of its operations and dangers resulting from the presence of gas. We believe that the lack of proper safeguards as well as inefficient and out-of-date methods of mining are responsible for the failure of the defendant to obtain insurance against its compensation liability. If it be conceded that the deceased committed suicide or violated approved rules and regulations, by what act of the deceased or rule of law shall we say that either was done willfully as contemplated by our Act?

Unless a deceased person leaves some written evidence of his intent, or an expression is made of his intent just prior to the taking of his life, who can delve into the mind and innermost soul of an alleged suicide and determine the intent and purpose of such a deed? Does the act of every person taking his own life automatically make such an act a deliberate and willful suicide? To accept the contention as to willful suicide from the record, would only mean delving into the realm of speculation and making tangible a mere fanciful defense.

In construing a section of the Virginia Act similar to Section 13 of our Act, the Supreme Court of that State, replying to a certified question propounded to the Industrial Commission of Virginia, held in the case of *King v. Empire Collieries Company*, 139 S. E., 478, that:

"Willful, as used in Workmen's Compensation Act, Section 14, denying recovery for injury due to employee's willful misconduct, imports something more than mere exercise of the will in doing the act. It imports a wrongful intention; an intention to do an act that he knows, or ought to know, is wrongful, or forbidden by law. It involves the idea of premeditation and determination to do the act, though known to be forbidden.

"Other cases in which compensation is denied by section 14 are (1) willful misconduct, including self-inflicted injury, or (2) growing out of an attempt to injure another, or (3) intoxication, or (4) willful breach of a rule or regulation of the employer brought to his knowledge before the accident. They all involve the idea of moral blame, or of 'conduct of a quasi-criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences.' Burns Case, 218 Mass., 8, 105 N. E., 601, Ann. Cas., 1916A, 787. None of them are cases of mere negligence. Except the single case of intoxication, all of them involve an affirmative exercise of the will, either to do what is manifestly wrong, or to refuse to accept known regulations of the employer made for the safe conduct of his business, and which are plainly reasonable. So we conclude that 'willful failure or refusal to perform a duty required by statute,' within the meaning of section 14, involves more than the ignorant failure to comply with the statute. The failure must be 'willful.' The employee must will or intend not to comply with the statute, and this he cannot do in the absence of all knowledge of the existence of the statute.

"The Legislature knew, of course, that there were a great many miners in the state who could neither read, write, nor speak the English language, who were to have the benefit of the Compensation Act along with others, and in making the exclusions of Section 14 it placed no moral blame, and hence provided that the failure to perform a duty required by statute in order to exclude one from the benefits of the act must be a 'willful failure or refusal,' a failure of such character as amounted to refusal. The knowledge of the law which is generally imputed to every one was excluded from the operation of section 14 by the use of the word 'willful' immediately preceding 'failure or refusal.'"

Adopting this construction until such time as the question is passed upon by our court, the Commissioner must conclude that there was no such willful violation in this case as to warrant a reduction in the compensation due the dependents herein.

Under Section 68 (b) of the Act, the dependents have the election to proceed at common law or accept compensation under the Act, since the defendant has failed to provide insurance or reject the Act. The dependents elected to accept the compensation benefits.

Under Section 58, the dependents wholly dependent at the time of the accident upon the deceased, are entitled to 60 per cent of the average weekly wage of the deceased for 350 weeks plus funeral expense not to exceed $200.00. Section 39 conclusively presumes the widow and children of a deceased employee to be wholly dependnt.

Upon the foregoing it is directed that there issue the following

Award

That the defendant pay into the Office of the Clerk of the Superior Court of Chatham County, in a lump sum, $3,350.62, which is the commuted amount of 350 weekly installments, commuted as of April 7, 1930, at the rate of $10.80 per week.

The money so paid to the Clerk of the Superior Court of Chatham County shall be held by him for the use and benefit of Jane Snuggs, widow, and Young Snuggs and Mae Frances, minor children of the deceased, to be handled by the said Clerk as like funds of indigent persons are handled. The defendant will pay funeral expenses not to exceed $200.00 to the proper person. The defendant will also pay the cost of medical and hospital bills incurred to the proper persons and will pay the costs of this hearing.

The condition upon which the above award is made is that if not complied with by the defendant within seven days after the receipt of same, this award may thereupon be docketed and judgment be had thereon in the Superior Court of Chatham County for the full amount of $3,350.62, and execution issue thereon; and upon the further condition that if not complied with the Commission will take steps to enforce the penalty prescribed in Section 68, which has accrued in the amount of $5,670.00, for failure to provide insurance.

An attorney's fee in the amount of $300.00 is approved and directed paid to Mr. H. C. Turner. This fee takes care of all of the expenses incurred by the attorney and his fee for representing the claimants.

[Docket No. 319]

C. E. WHEELER, Employee, Plaintiff, v. CITY ICE AND FUEL CO., Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed March 27, 1930

ARISING OUT OF AND IN THE COURSE OF.—Where assistant manager required to go to Home Office in another town and sustains injury by accident in Auto wreck enroute, injury arises out of and in course of employment.

Hearing before Commissioner DORSETT, March 21, 1930, at Wilson, N. C.

Plaintiff appeared in person.

Defendant represented by *S. W. Bailey* of Raleigh, N. C., Adjuster for the Maryland Casualty Co.

Opinion by DORSETT, Commissioner.

Statement of the Case

The plaintiff in this case, who is the Assistant Manager of the defendant employer, on December 1, 1929, found it necessary to go from his place of work in Wilson, N. C., to the home office of his employer in the City of Durham, N. C., for the purpose, according to the testimony, of the employer and the plaintiff, of talking over prices of coal, and also to get some bedding at Durham to carry to Wilson for the purpose of fitting up a bedroom for the plaintiff at the Wilson office. The evidence of the employer is that this plaintiff was employed and required to work seven days a week; that the average weekly wage was $20, and that he was performing a service for the master in coming to Durham for the purpose of talking over the above-mentioned coal prices and for the purpose of getting the said bedding, and that the gas for the trip was furnished by the said employer.

From all the evidence the Commissioner makes the following

Findings of Fact

1. The parties to this proceeding are bound by the provisions of the compensation act, and the Maryland Casualty Company is the insurance carrier.

2. On December 1, 1929, the plaintiff sustained an accident resulting in disability for a period of six weeks. The said accident arose out of and in the course of the employment of the plaintiff.

3. The amount of the hospital and doctor's bills incurred because of the accident is: hospital bills $71; doctor's bills $115.

Conclusions of Law

Under all the evidence the Commission is constrained to hold that the plaintiff is entitled to receive compensation. There were only two witnesses, the employer and the plaintiff, and their testimony was practically identical. Cross-examination failed to elicit any facts which were in any way contradictory. Both of the witnesses testified that the plaintiff worked seven days a week, that he was performing a service for the master in going to Durham to procure bedding and information as to coal prices, and that the employer furnished the gasoline necessary for the trip. Therefore does not disclose any facts which would lead the Commission to believe that the facts are not as stated. The case is therefore compensable.

Award

The defendants are ordered to pay compensation to the plaintiff at the rate of 60 per cent of $20, or $12 per week for a period of six weeks, and to pay to the proper persons the hospital and doctor's bills incurred because of the accident. Concerning the costs of this hearing, each side will pay its own. The defendants will pay the compensation in a lump sum because all compensation payable is now due.

[Docket No. 304]

J. G. BRINKLEY, Employee, Plaintiff, v. WILLIAMS LUMBER CO., Employer, and STANDARD ACCIDENT INSURANCE CO., Carrier, Defendants

Filed March 30, 1930

MARITIME EMPLOYMENT.—Accident occurring upon navigable waters is exclusively under admiralty jurisdiction and not under jurisdiction of this Commission.

Hearing before Commissioner DORSETT, March 18, 1930, at Southport, N. C.

Plaintiff appeared in person.
Defendants not represented.

Opinion by DORSETT, Commissioner.

The plaintiff, J. G. Brinkley, was employed by the Williams Lumber Co., defendants, to carry a boat which the defendant had recently purchased, from Wilmington to Morehead City. There is no doubt that the plaintiff was regularly employed by the defendant company, nor is there any doubt that the injury which he sustained while overhauling the boat in Southport preparatory to leaving for Morehead City arose out of and in the course of his employment. The boat was purchased by Mr. Williams in the interest of the company; it was paid for out of the funds of the company; it was to be used at Morehead City to carry prospective customers from place to place; the salary of the plaintiff was to be paid out of the funds of the company, and his name was on the company payroll.

The only question, then, is whether the case comes within the jurisdiction of the North Carolina Industrial Commission. We are of the opinion that it does not, and it therefore cannot be compensated. It is too well settled that the Federal Courts shall have jurisdiction of maritime matters. Article III, Section 2, Sub-section 1, of the Constitution of the United States states: "The judicial power shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority: to all cases of admiralty and maritime jurisdiction."

In *London Guarantee and Accident Company, Ltd., v. Industrial Accident Commission of California*, 49 Supreme Court Reporter, 296, Chief Justice Taft, writing the opinion of the court, clearly indicates that injuries such as the one involved in the instant case shall come exclusively within the admiralty jurisdiction. In the above-cited case we find the following: "To hold that a seaman engaged and injured in an employment purely of admiralty cognizance could be required to change the nature or conditions of his recovery under a state Compensation law would certainly be prejudical to the characteristic features of the general maritime law." The court further says: "Another objection to the admiralty jurisdiction here is that the vessel was not engaged in interstate or foreign commerce. It was employed only to run from the shore to Santa Monica Bay, five or ten miles to the deep sea fishing place and then return, and all within the jurisdiction of California. This argument is a complete misconception of what the admiralty jurisdiction is under the Constitution of the United States. Its jurisdiction is not limited to transportation of goods and passengers from one state to another, or from the United States to a foreign country, but depends upon the jurisdiction conferred in Article 3, Section 2, extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction." We further find that the court in conclusion says: "The conclusion sought to be drawn by counsel for the Commission from the Rohde and other cases is that the workmen's compensation acts will apply unless their application would interfere with the uniformity of the general maritime law in interstate and foreign commerce, and there is neither here. But this omits one of the grounds for naming an exception—that it shall not be prejudicial to the characteristic features of the maritime law. That is just what it would be here, for here we have a transaction on the navigable waters of the United States, which in every respect covers all the characteristic features of the maritime law, and has no other features but those. To apply to such a case a state compensation law would certainly be prejudical to those features. We must hold therefore that it was a violation of the exclusive maritime jurisdiction conferred by the Constitution to apply in this case the California Compensation Act."

From the above excerpts it is clear that the Industrial Commission has no jurisdiction in the instant case; the cases are very closely analogous, and the conclusion is inevitable. Furthermore if there were any doubt in the matter, it could be settled by reference to *Fitzgerald v. Harbor Lighterage Co.*, 244 N. Y., 132, and United States Supreme Court cases cited therein. The opinion in part is as follows: "Maritime jurisdiction is established both by the locus of the accident (*Grant Smith-Porter Co. v. Rohde*, 257 U. S., 469) and by the nature of the work (*Great Lakes Dredge, etc., Co. v. Kierejewski*, 261 U. S., 479; *Int. Stevedoring Co. v. Baverty*, U. S. Sup. Ct., Oct. 18, 1926). When the first of these grounds of jurisdiction is present without the second there is room for the contention that the Workmen's Compensation Act of the state can be applied without "material prejudice to any characteristic feature of the general maritime law" (*Millers Ind. Underwriters v. Braud*, 270 U. S., 59; *Terry & Tench Co. v. Lahti*, U. S. Sup. Ct., Oct. 11, 1926). When the two grounds concur, the law of the State must bend to the supreme law of the land the power of the nation (*Great Lakes Dredge, etc. Co. v. Kierejewski*, 261 U. S. 479; *Consalves v. Morse Dry Dock and Repair Co.*, 266 U. S., 171).

We further find in the above cited case (*London Guarantee Co. v. Industrial Commission*) the following: "Section 251 of the Judicial Code provides that jurisdiction vested in the courts of the United States in all civil causes of admiralty and maritime jurisdiction shall be exclusve of the courts of the several states, saving, however, to suitors in all cases the right of a common-law remedy where the common law is competent to give it. Where a stevedore engaged in unloading in navigable waters in New York was killed, and an award of compensation was made against the ship owner under the state Workmen's Compensation Act, it was held that remedy provided for compensation under a prescribed scale of injuries and deaths of employees without regard to fault, and being administered through a state administrative commission, was a remedy unknown to the common law and incapable of enforcement by the ordinary processes of any court, and hence was not among the common law remedies saved to suitors under section 256, and therefore such a remedy was contrary to the Constitution and laws of the United States. (*Southern Pacific Co. v. Jensen*, 244 U. S., 205.) The same principle was followed in *Clyde Steamship Co. v. Walker*, 244 U. S., 255."

It seems clear from the above that the Industrial Commission has no jurisdiction in this case, and it is therefore dismissed.

Following cases heard and determined, but are valueless as precedents and not published in advance sheets:

Jim Queen v. Chadwick-Hoskins Company and American Mutual Liability Ins. Company, Docket No. 302.

Guy F. Henry v. Henry Motor Sales Company and Hartford Accident & Indemnity Company, Docket No. 295.

Carl Yarborough v. Bobbitt Drug Company and Employers Liability Assurance Corporation, Docket No. 214.

Will E. Hall v. Durham County Board of Commissioners and U. S. F. & C. Company, Docket No. 293.

James Henry v. Tatum-Dalton Transfer Company and Great American Indemnity Company, Docket No. 265.

Frank Barber v. Packard Charlotte Company and U. S. Casualty Company, Docket No. 247.

L. D. Graham v. Retail Credit Company and Travelers Insurance Company, Docket No. 259.

Earl Crowder v. Carolina Mineral Company and Globe Indemnity Company, Docket No. 58.

R. D. Fields v. Pickett Cotton Mills and American Mutual Liability Insurance Company, Docket No. 274.

Richard Howard v. Murray Construction Company and Maryland Casualty Company, Docket No. 242.

Clifton Roper v. State Highway Commission Self-Insurer, Docket No. 276.

Paul B. Briggs v. Rex Spinning Company and Globe Indemnity Company, Docket No. 212.

J. K. Howell v. A. M. Johnson Rayon Mills, Inc. and Employers Liability Assurance Corporation, Docket No. 303.

Joseph G. Brinson v. Craven Foundry & Machine and Globe Indemnity Company, Docket No. 288.

J. R. Allen v. Acme Manufacturing Company and Indemnity Insurance Company, Docket No. 209.

Lonnie M. Burney v. City of Fayetteville and American Casualty Company, Docket No. 264.

A. B. Brooks v. Acme Dry Cleaning Company and Maryland Casualty Company, Docket No. 297.

W. W. Page v. Thompson Electrical Company and Great American Indemnity Company, Docket No. 346.

S. W. Cole v. Citizens Lumber Company and Maryland Casualty Company, Docket No. 76.

Simon Whitaker v. Highway Commission of Halifax County and U. S. Fidelity and Guaranty Company, Docket No. 239.

Sinclair Waring v. Walker & Son and American Employers Insurance Company, Docket No. 255.

James Holmes v. Camp Manufacturing Company and Consolidated Underwriters, Docket No. 246.

Ormond E. Chambers v. Union Oil Company and Maryland Casualty Company, Docket No. 32.

A. R. Austin v. Spray Cotton Mills and American Mutual Liability Insurance Company, Docket No. 252.

Dewey W. Craig v. Pomona Mills, Inc. and American Mutual Liability Insurance Company, Docket No. 320.

R. M. Tucker v. Poala Cotton Mills and American Mutual Liability Insurance Company, Docket No. 333.

J. B. Burton v. Atlantic Produce Company and Aetna Life Insurance Company, Docket No. 307.

Spencer Thompson v. Southern Cotton Oil Company Self-Insurer, Docket No. 317.

Ingrum Rhodes Cox v. Washington Mills Company and Ocean Accident & Guarantee Corporation, Docket No. 334.

Wade Almond v. Hatley Concrete Works and Maryland Casualty Company, Docket No. 21.

Alex Campbill v. Mack Construction Company, Inc. and Maryland Casualty Company, Docket No. 281.

H. W. Sprouce v. Queen City Coach Company and Indemnity Insurance Company of North America, Docket No. 283.

Ben F. Teeter v. Ford Motor Company Self-Insurer, Docket No. 280.

Viola Smith v. Domestic Laundry, Inc. and American Mutual Liability Insurance Company, Docket No. 341.

George Wilson v. Parker-Graham-Sexter, Inc. and Travelers Insurance Company, Docket No. 128.

David Byers v. Atlantic Bitulithic Company, Self-Insurer, Docket No. 331.

James Thomas v. J. Herbert Bats Company Inc. and Maryland Casualty Company, Docket No. 313.

Joe Allen v. Red Top Cab Company and U. S. F. & G. Company, Docket No. 330.

Lyle Jones v. Sylva Paperboard Company and American Mutual Liability Insurance Company, Docket No. 356.

Emlie Thompson v. Sylva Paperboard Company and American Mutual Liability Insurance Company, Docket No. 448.

Charlie M. Alford v. Sanitary Barber Shop and Aetna Life Insurance Company, Docket No. 336.

Will Spears v. North Carolina Lumber Company and Travelers Insurance Company, Docket No. 349.

J. B. May v. Southern Gas & Oil Company and Columbia Casualty Company, Docket No. 328.

W. B. Phelps v. Hart Cotton Mills, Inc. and American Mutual Liability Insurance Company, Docket No. 363.

J. F. Trogdon v. Erman S. Trogdon and Southern Surety Company, Docket No. 372.

T. S. Smith v. Jackson Brothers Company and American Mutual Liability Insurance Company, Docket No. 374.

James Holmes v. Camp Manufacturing Company and Consolidated Underwriters, Docket No. 246.

W. E. McCormick v. F. H. Grimm and The Travelers Insurance Company, Docket No. 358.

Oscar Plemmons v. American Enka Corporation and Travelers Insurance Company, Docket No. 337.

Dewey Friddle v. Bluebell Overall Company and General Accident Fire and Life Insurance Company, Docket No. 300.

Clayton Barnes v. Jennings Cotton Mills, Inc. and American Mutual Liability Insurance Company, Docket No. 347.

John McAbee v. Union Oil Company, Inc. and Maryland Casualty Company, Docket No. 338.

Vol. I Pages 371 to 403 No. 8

ADVANCE SHEETS

OF

OPINIONS IN CASES

HEARD AND DETERMINED
BY THE

NORTH CAROLINA INDUSTRIAL COMMISSION

RALEIGH

MAY, 1930

OPINIONS TO MAY 1

SUBSCRIPTION PRICE $5.00 PER YEAR
IN ADVANCE

PUBLISHED MONTHLY FOR THE COMMISSION
BY
EDWARDS & BROUGHTON COMPANY
RALEIGH, N. C.

Entered as second-class matter January 25, 1930,
at the post-office at Raleigh, North Carolina,
under the Act of March 3, 1879.

INDEX

Case *Page*
Joe Howell et al. *v.* Rocky Mount 373
A. G. Lumsden *v.* J. D. Orrell et al. 376
L. D. Edwards et al. *v.* Insurance Companies 378
Ike Straughan *v.* Oettinger Lumber Co. et al. 380
Howard Thomas *v.* Carolina Theatre et al. 381
Willow Ballard *v.* Cannon Mills Co. 382
Robert Strickland *v.* Powell Paving Co. et al. 384
Ruby Gerringer *v.* Pickett Hosiery Mill et al. 386
S. T. Adams *v.* Cochran & Ross Co. et al. 387
V. C. Rufty *v.* Ford Motor Co. 389
D. T. Walston *v.* State Highway Commission 390
H. R. Whitley *v.* State Highway Commission 393
R. M. Tucker *v.* Paola Cotton Mills et al. 395
Supreme Court Decision (Smith v. Power & Light Co.) 401

NORTH CAROLINA INDUSTRIAL COMMISSION

MATT H. ALLEN, CHAIRMAN
J. DEWEY DORSETT
T. A. WILSON
COMMISSIONERS

E. W. PRICE, SECRETARY

ELEVENTH FLOOR RALEIGH BANK & TRUST BUILDING
RALEIGH, N. C.

[Docket No. 254]

JOE HOWELL, Deceased, HARRIET HOWELL and MELINDA HERRING,
Plaintiffs, v. CITY OF ROCKY MOUNT, Employer,
Defendant, Self-insurer

Filed April 2, 1930

BRIGHT'S DISEASE.—Where death of an employee results from chronic kidney trouble and not accidental injury compensation denied.

Hearing before WILSON, Commissioner, in Rocky Mount, N. C., February 12, 1930.

Harold D. Cooley, Attorney at Law, of Nashville, N. C., represented Harriet Howell, widow of the deceased.

Defendant represented by *N. L. Thorpe*, Attorney at Law, Rocky Mount, N. C.

Opinion by WILSON, Commissioner.

This case was set for hearing at the request of Harriet Howell, as widow of the deceased, to determine two questions: (1) Did the deceased, Joe Howell, die on August 12, 1929, as a result of injuries sustained in an accident on September 2, 1929, said accidental injuries arising out of and in the course of his employment by the defendant? (2) If plaintiff's death *did* result from the injuries sustained as a result of the accident of September 2, 1929, who shall be entitled to compensation under the provisions of the Workmen's Compensation Act?

This case not only raised the very interesting question as to whether the deceased died as a result of said accidental injuries, but at the hearing it was learned that the deceased had worked for the City of Rocky Mount for about fourteen years, and during that time he had married twice,—both widows now living and neither one divorced,—and in addition thereto, between the first and second marriage he had a common law wife whom he introduced on many occasions to friends as "his wife." Both marriage licenses were issued in the City of Rocky Mount and both marriage ceremonies were performed by the same minister of the Gospel, Bill Howell.

There was also some question as to the correct spelling of the deceased's name, and for that reason one or two insurance policies had not been paid because of this difference in the spelling of his name.

The first wife of the deceased, Melinda Herring, testified that she married the deceased in 1923; that she lived with said deceased for about two and one-half years when she left him and went to the State of Virginia; that if deceased had ever secured a divorce she knew nothing of it; that she had never secured a divorce but that subsequent to her leaving him she married Bill Hrring, while residing in Virginia; that she is at the present time living with Bill Herring.

After the separation of Melinda Herring and Joe Howell, the deceased lived with Carrie Pompey for about two years. He never married her although on many occasions he introduced her as his wife.

Harriet Howell, second wife of the deceased, testified that she had known the deceased for about two years before they were married; that they were married March 16, 1929, and that she was dependent upon him for support prior to his death.

It was admitted at the hearing that the deceased sustained an accidental injury on September 7, 1929, which arose out of and in the course of his employment while riding in a truck owned by the City of Rocky Mount; that as a result of said injury the plaintiff sustained a fracture of the upper end patella, or knee cap, and that a fracture of lower end fibula, or outer bone of the leg below the knee.

The medical testimony tended to show that the deceased entered the Park View Hospital for treatment on September 2, 1929, and that at the time it was considered that the injured was suffering from a broken leg; that the injury was treated a few days to reduce the swelling and to ascertain the possibility of an infection setting in; that the cast was then put upon the leg and Joe Howell was sent to his home with instructions to return to the hospital within six weeks and have the cast removed from his leg.

Dr. C. T. Smith, diagnostician for the Park View Hospital, testified that this was the usual and approved treatment for such injuries.

Dr. H. L. Large, City physician, testified that he was called to the scene of the accident on September 2, shortly after it happened; that the deceased was entered in the hospital for treatment; that he did not treat the deceased after the date of the accident; that he was called over the telephone on the evening of October 12 to visit Joe Howell at his home but that he was performing an operation at the time and was unable to answer the call.

Dr. E. M. Perry testified that he was called to see the deceased on the night of October 12, 1929, and that he found the deceased in a dying condition; that the deceased died some fifteen minutes later; that this was the only time he saw Joe Howell.

The evidence tends to show that Joe Howell had a sudden attack of acute Bright's disease, and that he was extremely ill for about an hour preceding his death. The widow of the deceased with whom he was living at the time, testified that Howell suffered pain in his chest and across his abdomen just prior to his death and during the acute illness.

Owing to the fact that the deceased was receiving compensation at the time of the deceased's death, Dr. Large, City Physician, asked Dr. C. T. Smith, diagnostician, to assist him in an autopsy upon the deceased man's body to determine the real cause of his death. The anatomical findings (as the result of said autopsy) were:

1. Healed tubercular lesions of both lungs.
2. Chronic adhesive pleuritis.
3. Chronic interstitial nephritis.
4. Acute glomerular nephritis.
5. Probable syphilitic aortitis.

The plaster cast was not removed from the leg. Dr. Smith said he did not believe an examination of the leg would aid the findings. The evidence tended to show that the injury to the leg was neither the cause nor contributed to the death of deceased. Medical testimony tended to show that if there had been an infection of the injured leg it would have been necessary to remove the plaster cast because of pain.

There were no children as the result of any of the marriages.

The average weekly wages were $15.00.

Upon the evidence in this case the Commission makes the following

Findings of Fact

1. That the deceased and the employer had accepted the provisions of the Compensation Act; that the employer is a self-insurer.

2. That the deceased sustained an accidental injury which arose out of and in the course of his employment on September 2, 1929; that his right leg was injured as a result of said accident, and that he was temporarily and totally disabled from date of accident until October 12, 1929; that he had received compensation for this period.

3. That he was married to Melinda Herring in the City of Rocky Mount, North Carolina in 1923; that two and a half years later she separated from the deceased of her own accord and went to Virginia; that she was not dependent upon the deceased prior to his death and subsequent to their separation; that she married Bill Herring in Virginia without getting a divorce from Joe Howell; that there were no children as a result of their marriage.

4. That Carrie Pompey, the common law wife, was never legally married to the deceased and therefore is not entitled to consideration.

5. That Harriet Howell, widow of the deceased with whom he was living at the time of his death, was married to Joe Howell, the deceased, on March 16, 1929, in the City of Rocky Mount; that the deceased had not obtained a divorce from Melinda, his first wife, at the time of his marriage to his second wife, Harriet Howell, and that, therefore, they were not legally married.

6. That the average weekly wage of the deceased was $15.00; that compensation has been paid for period temporary total disability.

Conclusions of Law

Section 2 (f) provides that "injury" and "personal injury" shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident.

Neither widow of the deceased has proven conclusively that Joe Howell, the deceased, died as result of his accidental injury. Instead, the testimony tended to show that he died as result of acute Bright's Disease as the result of chronic kidney trouble.

The case is dismissed.

Each party will pay its own costs.

[Docket No. 279]

A. G. LUMSDEN, Plaintiff, v. J. D. ORRELL, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed April 2, 1930

NEPHRITIS.—Where accidental injury from burns develops into nephritis which affects heart and kidneys also causing total blindness, compensation awarded as for permanent total disability.

PERMANENT TOTAL DISABILITY.—Burns causing nephritis which results in total blindness and affects heart and kidneys compensation for permanent total disability allowed.

LOSS OF VISION.—Compensable as permanent total disability.

Hearing before T. A. WILSON, Commissioner, at Wilmington, N. C., February 19, 1930.

Plaintiff appeared in person.

Defendants represented by *W. C. Ginter*, Claims Manager, and *W. F. Brinkley*, Adjuster, of the Maryland Casualty Company.

Opinion by WILSON, Commissioner.

In the above styled case it was admitted that the plaintiff sustained an accidental burn, which arose out of and in the course of his regular employment by said employer September 16, 1929; that the burns were second degree, and that they covered the entire right arm, back of the shoulder and back of the right side to the waist.

Dr. H. A. Coddington testified that he first treated the plaintiff for burns on September 17, 1929, and that the plaintiff was then turned over to Dr. Bullock as he is the regular doctor for the Maryland Casualty Company.

The evidence in this case tended to show that the plaintiff was recovering from the burns but that on the twenty-third day following the burn, the plaintiff developed an acute case of nephritis, and that as a result of said nephritis the plaintiff has an extremely large and hypertrophied heart, large amounts of albumen in his urine, separation of the retina and an almost complete loss of vision.

The doctors testifying in the above-styled case said they they would, without hesitation, testify that the plaintiff's present condition is the result of the burns if it were not for the fact that in Masonboro Township, where the plaintiff tives, there was an epidemic of nephritis, which began about two weeks prior to the onset of the disease to the plaintiff; that there were some eight or ten cases in this neighborhood; that only one resulted fatally, and in that câse it was a young boy who had fallen from a horse; that most of the doctors, members of the County Medical Society, had observed the plaintiff some time or other during the illness. They all agreed that nephritis results naturally and unavoidably in certain cases from burns.

The evidence tended to show that the plaintiff is totally disabled for the rest of his natural life; that as a result of the burns the plainiff's kidneys were attacked and thus made him more susceptible to nephritis; that his nephritis was the result of the burns, and the present condition of his kidneys and heart are the result of the nephritis, and his blindness was also caused by nephritis.

Dr. John B. Cranmer testified that he had known the plaintiff all of his life, and that he had always been in good health; that he had never had a serious illness; that in his opinion the nephritis came as a result of the burns; that the plaintiff is permanently incapacitated; that he has an enlarged heart and is practically blind.

Upon the evidence in this case, the Commission makes the following

Findings of Fact

1. That both parties, plaintiff and employer, have accepted the provisions of the Workmen's Compensation Act, and the Maryland Casualty Company is the carrier.

2. That the plaintiff, on September 16, 1929, sustained an accidental burn of his right arm, right shoulder, and the right portion of his back from the waist up, and extending to the middle; that the accidental burns arose out of and in the course of his regular employment; that twenty-three days later the plaintiff developed an acute case of nephritis as result of said burns, which resulted in an enlarged and hypertrophied heart, albumen in the urine, and almost total blindness; that the plaintiff is permanently and totally disabled; that his average weekly wage was $16.50; that the medical bills have not been paid.

Conclusions of Law

The Commission holds that the above-styled case clearly comes within the provisions of Section 2 (f), which provides that a disease which results naturally and unavoidably from an accident arising out of and in the course of the employment is compensable.

All the evidence in the above-styled case tended to show that even though there was an epidemic of nephritis in the neighborhood where the plaintiff lived the plaintiff's kidneys were certainly weakened as a result of throwing off poisons caused by the severe burns; that the plaintiff was far more susceptible to acute nephritis as a result of said burns, and that the plaintiff's present physical condition was superinduced by the burns sustained while in his employment.

This was a very unusual case, and almost every doctor in New Hanover County was interested in the outcome because of the unusual circumstances. Probably all medical authorities were scrutinized by the members of the local Society because of the epidemic. It is a recorded fact that nephritis has developed as late as twenty days following burns, and in a community where there was no epidemic of nephritis.

Under Section 29 the Commission awards compensation at the rate of $9.90 per week, for a period not to exceed four hundred weeks; also full medical treatment and hospital costs.

The defendants shall pay the costs.

[Docket No. 240]

L. D. EDWARDS, Deceased, Employee; MRS. L. D. EDWARDS, Widow, Plaintiffs, v. CAROLINA INSURANCE AGENCY, HARTFORD FIRE INSURANCE COMPANY, EMPLOYERS LIABILITY ASSURANCE CORPORATION, GLOBE INDEMNITY COMPANY, AMERICAN EMPLOYERS INSURANCE COMPANY, Employers, Defendants

Filed April 3, 1930

INDEPENDENT CONTRACTOR.—A person engaged in writing insurance for various companies is free to go when and where he chooses and no control is retained over his actions; not an employee but independent contractor.

This was a claim from Madison County, heard before MATT H. ALLEN, Chairman, North Carolina Industrial Commission, at Marshall, N. C., on February 6, 1930.

It was admitted that the accident occurred in Buncombe County, but by agreement of both parties, plaintiff and defendants, the hearing was heard in Madison County, for the convenience of parties and witnesses.

Plaintiff represented by *John H. Mackelroy* and *C. H. Mashburn*, Attorneys, Marshall, N. C.

Defendant, Carolina Insurance Agency, represented by *C. W. DeVolt.*

Defendant, Hartford Fire Insurance Company, represented by *I. V. Roberts*, Attorney.

Defendant, Employers Liability Assurance Corporation, represented by *A. B. Dreher*, Attorney.

Defendant, Globe Indemnity Company, represented by *C. W. DeVolt.*

Defendant, American Employers Insurance Company, represented by *A. B. Dreher*, Attorney.

Opinion by ALLEN, Chairman.

Statement of the Case

It appears from the evidence that the deceased, L. D. Edwards, was engaged in writing fire, life, and liability insurance for the defendants, Carolina Insurance Company, Hartford Fire Insurance Company, Employers Liability Assurance Company, Globe Indemnity Company, and American Employers Insurance Company, and for the Prudential Life Insurance Company, which was not a party defendant; that the deceased gave all of his time to the writing of insurance in the counties of Yancey, Madison, and Buncombe; that the deceased was free to go when and where he chose, within the given territory; and that his compensation consisted of commissions which were made up of the differences betewen the gross premium, paid by the purchaser of insurance, and the amount charged to him as Agent; that the defendants exercised no control over the plaintiff, except on occasions when Special Agents of the defendants would call upon the deceased and drive over the territory with him for the purpose of collecting past due premiums and reinstating lapsed policies; that on September 9, 1929, the deceased, with his wife, drove by automobile from his home at

Mars Hill into Buncombe County to call upon insurance prospects, and particularly to see a Mr. Ray about fire insurance upon his home, covered, or to be covered, by a policy of the Carolina Insurance Agency, when his automobile overturned, resulting in the subsequent death of the deceased on September 13, 1929.

It is contended by the plaintiff that the deceased, L. D. Edwards, was in the joint employ of the several companies for which he acted as Agent, and that the employment was such as entitled the claimant to compensation under the North Carolina Workmen's Compensation Act.

The defendants, on the other hand, contend that the deceased was employed upon a commission basis, and that the defendants reserved no right of control over his actions, and that his compensation depended entirely upon the amount of insurance business written.

Findings of Fact

Upon all of the evidence the Commissioner finds the following facts:

1. That on September 9, 1929, the deceased, L. D. Edwards, was a duly authorized and licensed canvassing agent for the several defendant companies.
2. That his compensation consisted solely of commissions upon the business procured.
3. That the deceased executed his work entirely in accordance with his own ideas, without being subject to the orders of the defendants in respect to the details of his work, and that his movements were not directed by any particular insurance company.
4. That on the date of his accident, September 9, 1929, and his subsequent death, September 13, 1929, he was not engaged in the service of any particular defendant, but was making a tour of his territory, canvassing for various kinds of insurance.
5. That there is not sufficient evidence of the relation of employer and employee to entitle claimant to compensation under the North Carolina Compensation Act.

Conclusions of Law

It has been said by this Commission, in the case of *Williams v. Kitchen Lumber Company*, Vol. 1, O.N.C.I.C., page 211; that the doctrine of independent contract has not been abrogated by the Workmen's Compensation Act, and that one who contracts to do a specific work, and executes the work entirely in accordance with his own ideas, or with a plan previously given by the person for whom the work was done without being subject to the latter's orders in respect to the details of the work, is not a servant or employee, but is an independent contractor and not subject to the Workmen's Compensation Act.

Storm v. Thompson, 185 Iowa, 309 (20th A.L.R., 685).
Crafts v. Timber Company, 132 N.C., 158
Midgett v. Mfg. Company, 150 N. C., 340.

Award

Upon the foregoing authorities it is ordered that this claim be dismissed, and that an award issue denying compensation.

[Docket No. 203]

IKE STRAUGHAN, Plaintiff, v. OETTINGER LUMBER COMPANY, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Carrier, Defendants

Filed April 7, 1930

Loss of Vision.—Where evidence shows no causal relation of injury by accident to loss of vision in one eye compensation denied.

Review of the Full Commission at Raleigh, N. C., upon request of plaintiff, Ike Straughan, from the decision rendered by Commissioner Wilson, filed February 6, 1930.

Plaintiff represented by *Frazier & Frazier.*
Defendants represented by *J. H. Pou.*

Opinion for Full Commission by Dorsett, Commissioner.

This case came on to be heard before the full Commission upon application of renewal filed by the plaintiff. The full Commission heard the argument of counsel on both sides on February 24.

Upon the full consideration of all the evidence the Commission finds as a fact that the claimant, Ike Straughan, was on July 3, 1929, regularly in the employ of the defendant, Oettinger Lumber Company, on which date and while in the performance of certain duties incident to his employment, a small piece of chip struck him in the right eye; that on July 12, 1929, the claimant was fitted with glasses by Dr. I. H. Cummings, an optometrist, on which date claimant was blind in his right eye; that following July 3, the claimant worked regularly for about two months during which time he was quite as efficient in his work as formerly; that early in September the claimant entered Glenwood Park Sanitorium where he was treated by Dr. W. C. Ashworth, who found claimant suffering from high blood pressure, as well as complaining of great pain; that Dr. Ashworth treated claimant for pain, extreme nervousness and high blood pressure; that on September 2, claimant was treated by Dr. C. W. Banner, who found in claimant's eye a condition known as iritis; that Dr. Banner treated claimant for a few days in an effort to reduce the pain and to absorb the hemorrhage, but as claimant suffered so much pain and the eye was blind, Dr. Banner decided it was best to remove the eye, which he did; that asked if he got any history of a systemic condition causing claimant to be in the sanatorium. Dr. Banner said "Yes, sir, blood pressure, it would vary from 160 to 260 from time to time. I took his blood pressure at different times, and 180 was the highest I ever found it. It varied from 160 to 180." Dr. Ashworth and Dr. Banner both testified that the condition of claimant's eye could have been produced by either high blood pressure or a blow on the eye.

The Commission considers it most significant that claimant made no serious complaint about pain, was able to do his work in the usual manner, and presented no visible evidence of an injury to the eye for nearly two months following July 3. These facts have carried more weight with the Commission than the testimony of the three doctors who at the time of their respective examinations of the claimant found no evidence of trauma. The Commission does not find that claimant was blind in his right eye prior to July 3, notwithstanding it is difficult to perceive how one losing the vision of one eye could to all appearances have operated a machine such as claimant was required to use and not show unmistakable evidence of the handicap under which he was laboring. The Commission does find that the claimant has failed to establish a causal connection between his injury of July 2, 1929, and the loss of his eye, and the claimant has failed to show that the injury complained of aggravated or accelerated a pre-existing condition which resulted in the loss of the eye.

Conclusions of Law

The Commission has carefully considered all of the evidence, together with the briefs and arguments of counsel, and can find no reason to reverse or modify the findings and conclusions of Commissioner Wilson.

The findings of fact, conclusions of law, and order of Commissioner Wilson dismissing the action, are hereby affirmed and adopted as the findings of fact, conclusions of law and order of the full Commission, and an award will accordingly issue in accordance with the opinion.

[Docket No. 456]

HOWARD THOMAS, Employee, Plaintiff, v. CAROLINA THEATRE, Employer, EMPLOYER'S LIABILITY ASSURANCE COMPANY, Carrier, Defendants

Filed April 18, 1930

ASSAULT.—Where highwaymen compel assistant manager of theatre at point of gun to accompany them from end of car line back to theatre, then to open safe for purpose of robbery, thereafter injuries are inflicted by robbers striking him over head and broken ankles result, the injuries are held to be by accident arising out of and in the course of the employment.

Hearing held before WILSON, Commissioner, at Charlotte, N. C., April 14, 1930.

Plaintiff appeared in person.

Defendants represented by *A. B. Dreher*, Adjuster for the carrier.

Opinion by WILSON, Commissioner.

The above styled case came on for hearing to determine if the carrier and employer were liable under the Compensation Act for injuries sustained by Howard Thomas, a regular employee of the Carolina Theatre at Charlotte, North Carolina.

From the testimony submitted, it appears that the plaintiff was assistant manager of the Theatre, and about midnight on February 10, 1930, after closing the theatre, the plaintiff started home, and caught the usual street car he always rode home, and upon dismounting at the end of the car line, and while proceeding to his home, which is about six blocks past the end of the car line, an automobile drove up with two men in it.

One of the men in the automobile offered to give the plaintiff a ride from the car line to his home, and he refused the offer, whereupon one of the occupants of the car drew a gun on the plaintiff and forced him to enter the automobile, return to the theatre and there open the safe for the purpose of the men committing robbery.

Immediately after the robbery, one of the robbers hit the plaintiff and when he recovered consciousness he discovered that both ankles were broken and, according to the doctors' examination, two or three vertebrae were broken, and a complete rupture of the right kidney.

As a result of said injury the plaintiff has been temporarily and totally disabled from the date of said injuries.

At the hearing the plaintiff testified that he thought he would be able to return to work within a few weeks.

His average weekly wage as $22.00 per week.

The medical and hospital bills have not been paid.

The Commission finds as a fact that the plaintiff sustained an injury on February 10, 1930, which arose out of and in the course of his employment by the Carolina Theatre; that the said injury was the result of being hit by robbers who had forced the plaintiff to open the safe of the theatre after returning him to the theatre in an automobile, and as a result the plaintiff has been temporarily and totally disabled from the date of the accident, February 10, 1930; that the plaintiff's average weekly wage was $22.00; that the medical bills have not been paid.

The Commission awards compensation at the rate of $13.20 (60 per cent of $22.00) from the date of the accident, February 10, 1930, not to exceed four hundred weeks, and full medical attention.

The defendants will pay the costs of this case.

[Docket No. 65]

MRS. WILLOW BALLARD, Deceased, Employee, Plaintiff, v. CANNON MILLS COMPANY, Employer, Self-insurer, Defendant

Filed April 14, 1930

Unpaid Specific.—Upon death from natural causes, unpaid award for specific loss of use payable to dependents, next of kin.

Hearing before J. Dewey Dorsett, Commissioner, at Kannapolis, N. C., April 3, 1930.

Plaintiff was not represented. *J. C. Ballard*, brother-in-law of deceased was present to look after interests of minor children of deceased.

Defendant represented by *W. H. Beckerdite.*

Opinion by Dorsett, Commissioner.

Mrs. Willow Ballard, deceased employee of the Cannon Mills Company, received an injury September 19, 1929, that aggravated a serious preexisting condition, for which she was awarded compensation in an Opinion written by this Commissioner on November 8, 1929. The defendant employer has carried out the Award of the Commissioner by paying compensation during disability and in providing competent medical attention for their injured employee. On February 14, 1930, Mrs. Willow Ballard died.

A hearing was had on April 3, 1930, for the purpose of ascertaining whether or not Mrs. Ballard died from natural causes or whether or not the injury she received back in September, 1929, aggravating a preëxisting condition in any way contributed to her death.

The death certificate, signed by the last physician attending her, sets out that Mrs. Ballard died from "acute bronchitis, or possibly tuberculosis." This certificate is signed by Dr. G. C. Coddell of Hoffman, N. C., dated March 2, 1930. Two doctors testified at this hearing and neither of these doctors connected the death of the deceased with the accident in September, 1929,—Dr. Caldwell saying that in his opinion Mrs. Ballard died from natural causes, and that the probable cause of her death was pulmonary tuberculosis, and that the disease from which she died was not attributed to the injury she received in September, 1929, in any wise.

At the original hearing, the physicians testified they were not just certain what percentage of loss of use of the injured foot Mrs. Ballard would suffer because of the accident. At this hearing the physicians thought that the proper percentage of loss of use could better be arrived at when the period of temporary total disability terminated. Before this period of temporary total disability terminated, the plaintiff died. The physician who had attended the plantiff estimated that because of the accident in September, 1929, Mrs. Ballard had suffered the loss of use of the injured member to the extent of thirty per cent.

The deceased, Mrs. Willow Ballard, leaves a husband, Pete Ballard, and three minor children. The names of the children are, Bernice, Hugh and Nancy Ballard. All of the said minor children are several years under the age of eighteen. From the evidence it seems that these children are being cared for by an uncle, one J. C. Ballard, who represented these children at the hearing; the evidence is also to the effect that the father of these children is not capable of properly looking after the children; that he has not worked any for a long time, and it was the frank opinion of the witnesses testifying that he was a worthless kind of a fellow.

Mr. J. C. Ballard, the uncle of the minor children of the deceased, has qualified as the guardian of Bernice, Hugh and Nancy Ballard.

From all of the evidence, the Commissioner makes the following

Findings of Fact

1. The parties to this proceeding are bound by the provisions of the Workmen's Compensation Law. The minor children of the deceased are represented by an uncle, their guardian, Mr. J. C. Ballard.

2. Because of an accident sustained in September, 1929, for which compensation was paid during the period of temporary total disability, the plaintiff suffered a thirty per cent loss of use of the left foot.

3. The death of the deceased, Mrs. Willow Ballard, on February 14, 1930, was not attributed to the injury she sustained while employed by the defendant in September, 1929, but was from natural causes, probably acute bronchitis or possibly tuberculosis.

4. The next of kin dependent on the deceased are the three minor children, Bernice, Hugh and Nancy Ballard. The average weekly wages earned by the deceased at the time of her injury in September, 1929, was $15.13 per week.

5. All of the hospital and medical bills incurred because of the accident in September, 1929, have been paid by the employer.

Upon the foregoing findings of fact the Commissioner makes the following

Conclusions of Law

Under the North Carolina Workmen's Compensation Law, in Section 31, the employer is liable in compensation payments for sixty per cent of the average weekly wages during 125 weeks for the loss of a foot. In Section (t) we finding that for the partial loss of use of a member the employer shall be liable for such proportion of the payments provided in Section 31 for total loss, as such partial loss bears to total loss. Under Section 37 of the Act we find that where an employee receives or is entitled to compensation under the Act for an injury covered by Section 31 and dies from any other cause than the injury for which he was entitled to compensation, payment of the unpaid balance of compensation shall be made to his next of kin, dependent, upon him for support, in lieu of the compensation the employee would have been entitled to had he lived. It therefore follows that in the instant case the minor children above mentioned are entitled to receive the compensation due for the thirty per cent loss of use of the injured left foot of the deceased, and under the Law the above mentioned dpendents next of kin are entitled to receive the sum of sixty per cent of $15.13, or $9.08 per week for a period of thirty-seven and a half weeks.

It is therefore ordered that an Award be made directing the defendant Cannon Mills Company to pay compensation at the rate of $9.08 per week for a period of thirty-seven and a half weeks to the dependents next of kin of Mrs. Willow Ballard, the deceased, the compensation going to the three minor children will be paid to Mr. J. C. Ballard, their guardian.

It is further directed that the defendant pay the cost of this hearing.

Upon receipt of final settlement receipt the case will be closed.

[Docket No. 367]

ROBERT STRICKLAND, Employee, Plaintiff, v. POWELL PAVING COMPANY, Employer, and HARTFORD ACCIDENT AND INDEMNITY COMPANY, Carrier, Defendants

Filed April 14, 1930

Termination of Disability.—Where evidence shows disability has terminated and condition of employee at time of hearing result of pituitary tumor, further compensation denied.

Hearing before J. DEWEY DORSETT, Commissioner, at Winston-Salem, N. C., April 1, 1930.

Opinion by DORSETT, Commissioner.

Statement of the Case

The record in this case is exceedingly voluminous. I do not, however, think it is essential to review the evidence at any great length. The sole question for determination is whether or not there is any causal connection between the injury sustained by the plaintiff on August 31st, when he struck himself on the head with a pick, while doing some excavating for the defendant, and his disability since that date.

The plaintiff is an old darky, and he is contending that on the above date he suffered an accident resulting in a small concussion of the brain that is causing the disability that he is now suffering and has been suffering since the date of the accident. The defendants on the other hand are contending that the plaintiff's disability at the present time is the result of a pituitary tumor.

The claimant had worked only about two or three days for the employer when he met with the accident. From the evidence the Commissioner makes the following

Findings of Fact

1. The parties to this proceeding are bound by the provisions of the Workmen's Compensation Act.
2. The plaintiff, Robert Strickland, on August 31, 1929, while regularly employed by the defendant employer, as an ordinary laborer at the weekly wage of $15.00, received an injury that arose out of and in the course of his employment.
3. Because of the injury suffered on August 31, the plaintiff has been disabled for a period of thirty weeks.
4. The disability caused by the accident terminated thirty weeks from the date of the accident.
5. The plaintiff has suffered no partial disability because of the accident.

Upon the above findings of facts it is ordered that an award be issued directing the defendants to pay to the plaintiff compensation at the rate of $9.00 a week for a period of thirty weeks. It is further directed that the defendants pay to the proper persons all of the hospital and medical bills incurred because of the accident, and pay the cost of this hearing. It is further directed that the defendants pay to the wife of the plaintiff the sum of $21.00 since it was necessary that some one look after the plaintiff while disabled for that period. Defendants are entitled to a credit for compensation already made.

The defendants are directed to pay to the doctors attending this hearing, compensation for such attendance in an amount not to exceed $10.00 each. Out of the compensation due the plaintiff the defendants will pay direct to F. N. Cox, attorney, the sum of $50.00.

When this Commission receives final settlement receipt this case will be closed.

[Docket No. 357]

RUBY GERRINGER, Employee, Plaintiff, v. PICKETT HOSIERY MILL, Employer, and COLUMBIA CASUALTY COMPANY, Carrier, Defendants

Filed April 15, 1930

ECZEMA.—Where disease results from continual dipping of hands into dye, held not an injury by accident.

Hearing before DORSETT, Commissioner, March 31, 1930, at Graham, N. C.

Plaintiff appeared in person.

Defendants represented by *Mr. R. Alton Jackson*, of Winston-Salem, N. C., Adjuster for the Columbia Casualty Company.

Opinion by DORSETT, Commissioner.

Miss Ruby Gerringer, a young lady employee of the Pickett Hosiery Mill is asking compensation for disability resulting from a certain rash, or eczema, or infection, which she contends was caused by the kind of work she was doing. The evidence of the plaintiff is that while performing her duties for her employer she stuck a needle in her hand, and from this she thinks some of the dye she was handling caused her hand to become infected, thus causing the disability for which she is asking compensation. Her average weekly wage while employed was $18.

Dr. H. M. Troxler, the attending physician who first treated the plaintiff, reports that when he saw her she had an infection of the fingers of both hands caused by dye poisoning. Dr. Walker also saw the plaintiff, and reports that the only time he saw her she had some kind of infection on her hands. Dr. Walker did not testify at the hearing.

The evidence is that several days elapsed between the time the needle was stuck in the hand and the first time the doctor saw her. The evidence of the doctor is that when he saw the patient there was no evidence of any puncture in the hand. This plaintiff says that the needle was stuck on the inside or palm of her hand. The evidence of the doctor was that the fingers and between the fingers and the back of the hand were infected, or broken out with some kind of rash, and in the doctor's opinion this rash or breaking out was caused by the dye in the materials used at the hosiery mills. The doctor further testified that he had had experience with similar cases where there was no trauma in evidence at all.

From all the evidence the Commissioner must conclude that the plaintiff has failed to prove that she sustained an accident resulting in disability; that whatever she is suffering from is most likely an occupational disease, and for the reason that the burden of proof has not been sustained the Commission must dismiss the case. Each side will pay its own costs.

[Docket No. 414]

S. T. ADAMS, Employee, Plaintiff, v. THE COCHRAN & ROSS COMPANY, Employer, and U. S. CASUALTY COMPANY, Carrier, Defendants

Filed April 17, 1930

AVERAGE WEEKLY WAGE.—Computed on basis of wages received at time of occurrence of accident and not by using earnings in other employment during whole of previous year.

MEDICAL ATTENTION.—Evidence insufficient to show that claimant not receiving proper medical attention.

Hearing before DORSETT, Commissioner, April 4, 1930, at Charlotte, N. C.

Plaintiff represented by *John G. Newitt*, Attorney at Law, of Charlotte, N. C.

Defendants represented by *Ralph V. Kidd*, Attorney at Law, Charlotte, N. C.

Opinion by DORSETT, Commissioner.

S. T. Adams was employed by the Cochran & Ross Company as a truck driver, at a wage of $13.50 per week. While performing his duties as a driver for his employer he suffered an accident on October 31, 1929, resulting in a back broken in two places and other injuries that have caused his disability since the date of the accident.

The defendants admit that Adams was regularly employed; that the U. S. Casualty Company is the insurance carrier, and that the plaintiff suffered an injury as the result of an accident which arose out of and in the course of his employment; the defendants claim, however, that they did not receive proper notice of the accident.

The plaintiff is contending that he has not received proper medical treatment at the hands of the defendants; that he is entitled to compensation at the rate of sixty per cent of his average weekly wage during his period of disability, and is entitled to have all of his hospital and medical bills paid, and have furnished to him such additional treatment as to perfect a cure, and remedy his present condition. He contends that he is entitled to an average weekly wage greater than thirteen dollars and a half, swearing that he had been employed by this employer only for a short while, and that prior to this time he had been earning twenty-five and thirty-five dollars per week; he contends that since the date of the accident he has not been able to work at all and has done no work.

Just after the accident, the plaintiff was carried to a hospital and given the proper treatment for some two or three weeks by Dr. Myers of Charlotte, North Carolina. Dr. Myers discharged him as able to work and the plaintiff left the hospital. Since that time, however, the plaintiff has been examined by other physicians of Charlotte, who say that he has been disabled since this accident and that from X-rays taken he suffered a broken back on October 31, 1929.

From all the evidence the Commission makes the following

Findings of Fact

1. The parties to this proceeding are bound by the provisions of the North Carolina Compensation Act; the United States Casualty Company is the carrier; that this accident arose out of and in the course of the plaintiff's employment.

2. The plaintiff suffered an accident on October 31, 1929, while regularly employed by the defendant, which resulted in serious injury to his back, causing his disability since the date of the accident.

3. The average weekly wage at the time of the accident was $13.50 per week.

4. The employer has had sufficient notice of the accident, and his rights have not been prejudiced by lack of notice.

5. The plaintiff has not been able to work since the date of the accident, and is still disabled.

Conclusions of Law

The plaintiff is entitled to compensation at the rate of sixty per cent of $13.50, or $8.10 per week, since October 31, 1929, and is entitled to receive this weekly compensation during the period of temporary total disability, which has not terminated.

Under the evidence the plaintiff has not satisfied the Commission that he is entitled to have his compensation figured on an average weekly wage greater than thirteen dollars and a half per week—the wage he was receiving as a truck driver at the time of the accident.

The evidence in this case does not sustain the position contended by the plaintiff that he has not received the proper medical treatment. We believe that he has been in the hands of competent physicians.

Award

The defendants are directed to pay to the plaintiff compensation at the rate of $8.10 per week since October 31, 1929, and during the period of temporary disability. The defendants are further directed to furnish to the plaintiff the proper medical and hospital treatment as will lessen his period of disability and effect a cure of his crippled condition. They will, therefore, offer to the plaintiff this medical treatment at the hands of physicians of their own choice. The defendants are further ordered to pay the proper persons all hospital and medical bills incurred because of the accident, and to pay to Drs. Shull & Myers the sum of $10.00 each for testimony at this hearing, and to pay to Drs. Shull & Fetner a bill, under date of March 25, 1930, in the amount of $30.00 for professional services rendered, and to pay to Dr. Alonzo Myers $62.00 as per statement rendered for professional services dated April 4, 1930.

Concerning the other costs of this hearing, each side will pay its own.

A fee in the amount of $100.00 is approved for Hon. John Newett, attorney at law, representing the plaintiff.

All past due compensation will be paid to the plaintiff in a lump sum, and the hundred dollars fee (approved herein) is directed to be paid direct to the attorney out of the past due compensation.

When final settlement receipt is filed this case will be closed.

[Docket No. 397]

V. C. RUFTY, Employee, Plaintiff, v. FORD MOTOR COMPANY, Employer, Self-insurer, Defendant

Filed April 17, 1930

EYE.—Commission will not order enucleation where specialist will not recommend.

REFUSAL OF MEDICAL CARE.—Refusal to have eye enucleated where not recommended by specialist not a refusal of medical treatment.

LOSS OF VISION.—Thirty-eight per cent loss of vision in one eye entitles claimant to 38 weeks' compensation.

Hearing before DORSETT, Commissioner, on April 4, 1930, at Charlotte, N. C.

Plaintiff represented by *Wade Williams*, attorney at law, Charlotte, N. C. Defendant represented by *H. R. Yoos*, Chief Clerk, Ford Motor Company.

Opinion by DORSETT, Commissioner.

V. C. Rufty, while regularly employed by the Ford Motor Company, on September 24, 1929, sustained an injury to his eye, when a nail, struck by a fellow employee, hit plaintiff in his eye. The file in this case contains an agreement dated October 11, 1929, for the payment of temporary total disability. This agreement was approved by the Commission on October 16, 1929.

During the time this plaintiff was receiving treatment for his injured eye the doctors recommended that the eye be removed to prevent impairing the vision of the other eye. The plaintiff objected to the enucleation of the eye because the vision in his uninjured eye was not good and he refused to have the eye removed. The Ford Motor Company is contending that this eye should be removed to the end that the said motor company should not have to bear the responsibility of anything that might happen to the other eye through sympathy with the injured one.

At the time the doctors recommended the enucleation of the injured eye it seem that the vision in that eye was never going to be such as to amount to anything; that the eye showed a loss of vision of fifty-one and one-tenth per cent. However, since the plaintiff refused to have the eye removed the vision in that eye has improved to the astonishment of the physicians; they admit that the eye improved more than they had any idea it would, and at the present time this injured employee has the same vision in both eyes; and from a close examination he has lost thirty-eight per cent vision in each eye, the loss in one eye from natural causes, the loss in the other eye from the injury above mentioned.

The eye specialist who treated plaintiff was asked these questions:

Q. Dr. Smith, forgetting about everything except the welfare of your patient, he is in your hands, what do you recommend him to do?

A. What would I recommend him to do?

Q. Yes, what do you recommend him to do with reference to this injured eye?

A. I would leave it in.

From all the evidence, the Commission makes the following

Findings of Fact

1. Parties to this proceeding are bound by the provisions of the Compensation Law.
2. The plaintiff sustained an accident while regularly employed by the Ford Motor Company to his left eye, resulting in temporary total disability from the time of the injury to the time he returned to work at full wages, and also resulting in the loss of vision in the left eye of 38 per cent.
3. The plaintiff by his refusal to have his eye enucleated, did not refuse medical treatment offered, and was within his rights in refusing to have the eye removed.
4. Plaintiff has received compensation from the employer during the period of temporary total disability.

Conclusions of Law

The medical testimony in this case is that this plaintiff has the same vision in the injured eye that he has in the uninjured eye; that the vision in each eye is 62 per cent good. In the opinion of the eye specialist attending this plaintiff, the injured left eye should not now be enucleated, and we must say that this opinion is the correct one, and under no circumstances will this Commission direct this plaintiff to submit to an operation for the removal of that eye.

Award

The defendant Ford Motor Company, a self-insurer, is directed to pay compensation for the specific loss of vision in the left eye at the rate of $15.00 a week for a period of 38 weeks, to pay to the proper parties any unpaid hospital or medical bills, and to pay the costs of this hearing.

The compensation to be paid by this Award for the specific loss of vision in the left eye is in addition to the compensation already paid by the defendant to the plaintiff during the period of temporary total disability.

A fee in the amount of $50.00 is approved for Mr. Wade Williams, attorney for the plaintiff.

[Docket No. 384]

D. T. WALSTON, Employee, Plaintiff, v. NORTH CAROLINA STATE HIGHWAY COMMISSION, Employer, Self-insurer

Filed April 23, 1930

TERMINATION OF DISABILITY.—Where condition of claimant at time of hearing is result of disease not caused by accident, compensation denied for period following termination of disability caused by accident.

Hearing before DORSETT, Commissioner, March 21, 1930, at Halifax, N. C.

Plaintiff represented by *Wade H. Dickens,* Attorney at Law, of Scotland Neck, N. C.

Defendants represented by *H. K. Witherspoon,* representing the North Carolina State Highway Commission.

Opinion by DORSETT, Commissioner.

The only question for determination in this case is whether or not the claimant, D. T. Walston, who received an injury on July 25, 1929, while in the service of the State Highway Commission, that arose out of and in the course of his employment, has recovered from the effect of the said injury. In other words, has the period of temporary total disability terminated? The State Highway Commission has paid the plaintiff compensation since the date of the accident up to March 2, 1930, at the rate of $9.00 per week, and has furnished to the plaintiff the proper medical treatment.

There is no difference of opinion of the two physicians who testified at the hearing concerning the matter of the claimant's disability since July 25, 1929. Both of the doctors are positive that the plaintiff has been disabled since that day, and that he has not been able to do any kind of work. There is, however, a serious difference of opinion of the two doctors concerning the cause of the plaintiff's present disability. Dr. Thigpen is positive that the accident on July 25, 1929, is the cause of the present disabled condition in which he finds his patient, the plaintiff. Dr. Bass is of a different opinion. Dr. Bass says that the plaintiff's present incapacity is due to a disease disconnected with the accident suffered on July 25, 1929. Both doctors have treated the plaintiff and both examined the plaintiff on the date of this hearing.

The plaintiff was injured when he attempted to help get an automobile out of a ditch that had slipped into the ditch, and claims that when doing this he had a peculiar feeling in his hips and back; that he suddenly turned blind temporarily.

Dr. Thigpen says that he first saw the plaintiff about ten days after the occurrence of the accident; that when he came to him he was limping; that he had some swelling in his leg and thigh, and an extreme prosis at that time of the abdominal organs, and the doctor further said that it seemed to him that it was of the intestines. Some few days later Dr. Thigpen says that he carried the plaintiff to the hospital for a thorough examination, and he found his urine negative; no evidence of any kidney lesion; the Wassermann test was negative and the X-ray picture did not show any injury to the bony structure and the hip joints seemed to be normal. Dr. Green seems to have made the examination at the hospital and Dr. Thigpen says that he and Dr. Green both agreed after that examination that the plaintiff had suffered a sacro-iliac sprain, and that this examination showed that the stomach of the plaintiff was extremely swollen and he thought probably that the accident had something to do with the swelling of the stomach.

The plaintiff testified that at the present time he is swollen in his stomach and over his kidney and in his hip, and he has trouble in his back. In his words, "There is a tingling in my head and a tingling in my hip joint and stomach," and in explaining the tingling in his head he says that he feels "a popping in the back of my neck," and that sometimes he falls while eating; that if he stoops over to tie his shoes he falls; that this happens to him three or four times a week.

Dr. S. P. Bass testified that he saw the plaintiff about two months after the accident and that when he saw him he was complaining of his back and that he must have had a slight apoplectic stroke. Dr. Bass said that all of the plaintiff's reflexes are exaggerated and that there is diminished sensation and muscle power; that the abdominal walls are sagged and the whole thing is relaxed, which leads him (the doctor) to believe that the sacroiliac relaxation is due to that condition.

Dr. Bass thinks that the lifting and exertion back in July was not the cause of the disability, because such a disabled relaxed condition could come without that cause. The doctor says that plaintiff gave him a history of having had a blow on his head sometime back, saying that a flag pole fell on his head resulting in practical blindness in his right eye. His left eye, when the doctor examined him, showed a partial paralysis of the internal retinal muscle, which he says could not have been caused by exertion. It is the doctor's opinion since all of his reflexes were exaggerated, that there must be some central nervous disease. There is a distinct loss of power in his right side. Dr. Bass is positive that the relaxation of the belly wall could not have been caused by the exertion complained of causing the accident. Dr. Bass, at the end of his testimony, was asked by the Commissioner if he considered this man suffering from disease disconnected with the accident, and the doctor's reply was, "I do." The doctor was further asked if he had any positive proof of any disease, and he replied, "Yes, a degenerated brain condition"; the plaintiff's reflexes and lack of muscle power indicated to him (the doctor) that there was positive proof of a disease.

From all of the evidence the Commissioner makes the following

Findings of Fact

1. The parties, plaintiff and defendant, are bound by the provisions of the Compensation Law of 1929. The plaintiff suffered an accident on July 25, 1929, that arose out of and in the course of his employment with the defendant, resulting in temporary total disability for the period from July 25, 1929, to March 2, 1930, and that compensation at the rate of sixty per cent of fifteen dollars, the average weekly wage, or nine dollars per week, has been paid by the defendant employer for that period.

2. The period of temporary total disability, because of the accident suffered, has terminated. This period terminated on or before March 2, 1930.

3. Under the evidence in this case any disability after March 2, 1930, is not caused by the accident suffered on July 25, 1929, a greater weight of the evidence being that the present physical condition of the plaintiff is due to his diseased condition not caused by the accident.

Conclusions of Law

No case that has engaged the attention of the Commissioner has made a greater appeal to his sympathy than the instant case. The plaintiff for four or five years, has been a dependable employee of the State Highway Commission. We do not believe, however, that under this evidence the employer should be required to pay further compensation, and it cannot be found as a fact that the present disabled condition is caused by the accident suffered on July 25, 1929. We are compelled therefore under the evidence to dismiss the case, and grant the employer the right to stop the payments of compensation.

Award

It is directed that an award issue denying any further compensation to the plaintiff and permitting the employer to stop payments of compensation as of March 2, 1930.

Concerning the costs in this hearing, the defendant is directed to pay the medical witnesses; the other witnesses will be paid by the party that subpoenaed them. The defendants will therefore pay to Dr. Thigpen the sum of $25.00 for his attendance at this hearing, and the sum of $14.00 for services rendered the plaintiff, as per statement rendered April 1, 1930.

When final settlement receipts are filed, the case will be closed.

[Docket No. 396]

H. R. WHITLEY, Employee, Plaintiff, v. NORTH CAROLINA STATE HIGHWAY COMMISSION, Employer, Defendant

Filed April 24, 1930

Shot by Hunter.—Stray shot from hunter's gun striking employee on highway while at work, resulting loss of eye held to be an accident arising out of and in the course of the employment.

Eye.—Loss of eye from stray bullet from hunter's gun held compensable.

Hearing held before Wilson, Commissioner, at Greenville, N. C., on April 9, 1930.

Plaintiff represented by *M. K. Blount*, Attorney at Law, Greenville, N. C.

Defendant represented by *H. K. Witherspoon*, Secretary Highway Commission.

Opinion by Wilson, Commissioner.

Summary

It was admitted at the hearing that the plaintiff was a regular employee of the North Carolina State Highway Commission; that his average weekly wage was fifteen dollars; that he has complete loss of vision in his left eye.

The evidence in this case tends to show that the plaintiff was shot in his left eye February 5, 1930, just after he had eaten his lunch at the noon hour and about one o'clock, while wiping some grease off of the transmission of a highway truck which he was repairing at the time; that the truck was just outside of the garage owned by the Highway Commission, near the highway, a mile and a half from Greenville; that there were some woods in the bend of the road in close proximity to the garage; that Mr. Kittrell, who is not employed by the Highway Commission, and who lives near Greenville, was riding along the road with J. S. Morton, when he noticed some birds across the road, and it was suggested to Kittrell that he get his gun and dog and they would shoot the birds; that the two men returned to the city, got the gun and dog and upon the return to this section of the road, found the birds; that Kittrell fired both barrels of his shotgun at the birds and hearing someone holler, ran to see the injured person; that he found the plaintiff, who said that he had been shot in the eye and felt a sprinkle of shot on his shoulder; that the truck shed was behind some bushes from the position Kittrell occupied when he fired at the birds; that the plaintiff was temporarily and totally disabled from February 5 to February 17, 1930; that the medical bills have not been paid.

Upon the evidence in this case the Commission finds as a fact,

1. That the employee and employer had accepted the provisions of the Compensation Law; that the North Carolina State Highway Commission is a self-insurer.

2. That the plaintiff was accidentally injured on February 5, 1930, while regularly employed by the North Carolina State Highway Commission; that the plaintiff was shot in his left eye by a bird hunter; that as a result of said accidental injury he was temporarily and totally disabled from February 5 to February 17, 1930; that the plaintiff has complete loss of vision in his left eye; that the accident arose out of and in the course of his employment.

3. That the medical bills have not been paid; that the plaintiff is entitled to full medical, hospital and surgical attention, and that the medical bills have not been paid up to date.

Conclusions of Law

The case before the Commission presents the unusual question as to whether an employee of the State Highway Commission is entitled to compensation as the result of losing the vision in his left eye caused by a gunshot wound.

The facts in the case show that the plaintiff was repairing the transmission of the highway truck shortly after the noon hour, when a bird hunter accidentally shot him in the eye. The hunter was not connected with the Highway Commission. There were trees partly surrounding the garage.

Section 2 (f) provides that "'personal injury' shall mean only injuries arising out of and in the course of the employment."

There is no question about the above injury being sustained "in the course of" plaintiff's employment. However, there is the question as to whether the plaintiff's injury was the result of an "accident arising out of" his employment.

The plaintiff was serving his employer at the time of his injury. He had not exposed himself to an unnecessary hazard, but the hazard was one common to his employment. It was "unusual," but it need not have been anticipated, nor need it ordinarily be one peculiar to the particular employment in which the employee was engaged. *State v. District Court of Ramsey County*, 153 N.W., 119; 129 Minn., 502; L.R.A., 1916, A. 344.

Although the accident causing injury to a workman claiming compensation may not be connected with or of any relation to the particular employment of the workman at the time he received the injury, nevertheless, if in point of fact the position in which he was doing the work and the place he was necessarily required to occupy under his employment was a position and place of danger which caused the accident, it may fairly be said that the "accident arose out of the employment." *Chicago I. & L. Railroad Company v. Clendennin*, 143 N.E., 303, 304; 81 Ind. App., 323.

"Injury arises out of employment" when it occurs in the course of employment and is result of risk involved in or incident to employment, or conditions under which it is required to be performed. *Whitney v. Hazard Lead Works*, 138 A. 105, 106; 105 Conn., 512; *Porter v. City of New Haven*, 135 A., 293, 294; 105 Conn., 394.

Injury has to do with and arises out of work or business of employer, when it results from risks or hazards which are necessarily, accordingly, or reasonably inherent in or incident to conduct of such work or business. *Texas Employer's Insurance Association v. Owen*, Texas 291; S.W. 940, 943.

Award

The Commission awards compensation to the plaintiff at the rate of $9.00 per week (60 per cent of $15.00), for the period of temporary total disability of twelve days, from February 15 to February 17, 1930, and for one hundred weeks at the same rate, dating from February 17, 1930, as provided for in Section 31 (q), plus all medical, surgical, hospital and other treatment, as provided for in Section 25.

The defendants will pay the costs.

[Docket No. 333]

R. M. TUCKER, Employee, Plaintiff, v. PAOLA COTTON MILLS, Employer, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Carrier, Defendants

Filed April 25, 1930

ARISING OUT OF AND IN THE COURSE OF.—Employer condoning practice of employees filling radiator of personal auto from hot water vat on employer's

premises during work hours and injury results when flooring over vat breaks and precipitates employee into hot water, injuries and burns resulting compensable.

Plaintiff did not appear and was not represented by an attorney.

Defendants represented by *R. A. Gardner*, Attorney at Law and Adjuster for the carrier.

Opinion for the full Commission by WILSON, Commissioner.

This case came on for review before the full Commission on March 25, 1930, at Raleigh, N. C., from a decision by Chairman Allen after the first hearing at Statesville, N. C., on March 5, 1930.

Summary

The undisputed facts in this case are that the plaintiff was regularly employed by the Faola Cotton Mills, as watchman and fireman working from seven p.m. to six a.m.; that as fireman he was required to go to the "hot water hole" twice each night to let water into the boiler; that the "hole" is between the boiler room and the mill on premises of said employer; that it is a concrete vat, used to condense steam into water to be used in the boiler again; that the vat is covered with two-inch oak lumber; that the company furnishes a shed for the employees to park their cars under; that they can park their cars anywhere except on the lawn; that it was a cold night; that the accident occurred about five-thirty a.m., when the plaintiff went to the hole to get water to put into radiator of his car which he had drained to keep from freezing; that a board broke, causing him to fall into the hot water; that the plaintiff has been temporarily and totally disabled from January 21, 1930, because of burns to the right leg from the knee to lower middle third of leg, covering entire surface, and also the inner surface of left leg was charred.

J. J. Sanders, overseer of both day and night employees, testified that it was "the custom to get water from this vat for the cars," and that "quite a few of us do that same thing."

R. L. Poovey, general superintendent, testified that "I just know the same as the others have told you."

The average weekly wages were found to be fourteen dollars. No medical or hospital bills have been paid.

Upon the evidence in this case the full Commission makes the following

Findings of Fact

1. That both employee and employer have accepted the provisions of the Compensation Act; that the American Mutual Liability Insurance Company is the carrier.

2. That plaintiff sustained accidental injuries at five-thirty a.m., January 21, 1930, while getting water from a "hot water hole" on premises of his employer to put in plaintiff's car; that said injuries arose out of and in the course of plaintiff's regular employment by said employer; that said in-

juries resulted in both legs being burned, causing temporary and total disability from date of said accident.

3. That the wages were ($14.00) per week; that medical and hospital bills have not been paid.

Conclusions of Law

Section 2 (f) provides that an injury and personal injury shall mean only "injury by accident arising out of and in the course of the employment. . . ."

It is admitted that the accidental injury to plaintiff was "in the course of the employment," but the issue raised is, as to whether the accident "arose out of the employment."

Plaintiff said he was required to "get on" the boards over the hole twice every night to let water into boiler, but that at the time of the accident he was getting water for his car. The overseer testified that "quite a few of us" get water from the hole for our cars. The general superintendent testified that he could tell the same thing "as the others."

The plaintiff did not violate any rule or regulation. Neither did he leave the premises of his employer, but he did go to the same "hole" where his overseer and many others went for water to fill their radiators before leaving the premises. No evidence was submitted to show that he had neglected his job. It was a common practice indulged in by other employees and condoned by the employer. The board covering the hole was unsafe. The piece supporting the top broke.

A workman during working hours went upon his employer's roof to get cool. This was in violation of a rule of the employer, though the rule had become a dead letter through nonenforcement. The next day his body was found beside the building, where it would be if he had fallen from a portion of the roof not protected by a railing, which place was twenty-three feet from a door giving access to the roof from the room in which the workman was employed. In holding that the accident arose out of the employment the court said: "The accident happened upon the premises of the employer and we think, in view of the practice which might have been found to exist under which the men went upon the roof for fresh air, that the act of the deceased in going there on a warm night was not necessarily outside his employment, but could have been found to be incidental thereto. An injury to a workman may arise out of and in the course of his employment even if he is not actually working at the time. 52. *In re Von Ette*, 223 Mass., 56; 111 N. E. 696; L. R. A. 1916 D, 641.

See *Bradley v. Ozark Mills*, 10 N. C. I. C., 298.

Defendants submitted the following citation: *Vickers v. Ala. Bower Company*, 117 S. 650; *Everett Hat Company v. Industrial Commission, et al.*, (Ill.) 137 N. E., 434; Ohio case, 162 N. E. 272; Bevington H. Savage Case, (Mass. 1926). These cases are in point, yet this difference exists between the Savage case (Mass. 1926) and the one before us. Rugg, C. J., in closing, says, "the employee was not on the part of the subscriber's premises where his employment carried him." The plaintiff in the case before the full Commission, was at a "hot water hole" where he was required to go as fireman, twice each night, and the supporting board broke, he fell into hole and was burned. It was unsafe for an employee at any time, as shown by this accident.

Award

The full Commission awards compensation to plaintiff from January 21, 1930, at the rate of $8.40 (60 per cent of $14.00 per week) plus full medical and hospital treatment.

Another hearing will be held if necessary, to determine if there is any permanent injury or disfigurement.

The defendants will pay the costs of this hearing.

Following cases heard and determined, but are valueless as precedents and not published in advance sheets:

L. M. McCoy v. N. C. Flux Company and Travelers Insurance Company, Docket No. 389.

Aeron Masters v. J. Walter Wright Lumber Company and Maryland Casualty Company, Docket No. 311.

Mrs. Eleanor O'Neal v. Nash Motor Sales Company and Aetna Life Insurance Company, Docket No. 277.

D. J. Everett v. N. C. State Fair and Self-Insurer, Docket No. 314.

Newton Willis v. Carolina Mineral Company and Globe Indemnity Company, Docket No. 352.

J. B. Bruton v. Atlantic Produce Company and Aetna Life Insurance Company, Docket No. 307.

F. J. Reeves v. P. E. French and The Century Indemnity Company, Docket No. 360.

Toney Regent v. W. P. Rose and Company and Maryland Casualty Company, Docket No. 324.

J. S. White v. P. R. Ashby and Company and Hartford Accident & Indemnity, Docket No. 272.

Melvin McAbee v. Asheville Cotton Mills and Maryland Casualty Company, Docket No. 298.

C. L. Simpson v. Morganton Motor Company and Travelers Insurance Company, Docket No. 269.

J. Dean Styers v. Gazette Publishing Company and London Guarantee & Accident Company, Docket No. 211.

Stewart Browser v. Richmond Cedar Works and Self-Insurer, Docket No. 139.

James P. Davis v. Paschall Bakery Company and Maryland Company, Docket No. 350.

W. T. Leonard v. Nokomis Cotton Mills and Aetna Life Insurance Company, Docket No. 430.

Adams Harpe v. Leonard Dry Cleaning Company and London Guarantee & Accident Company, Docket No. 389.

A. W. Thompson v. Bessemer Ice and Fuel Company and Hartford Accident & Indemnity Company, Docket No. 437.

Mrs. Ella Walker v. Gray Manufacturing Company and Travelers Insurance Company, Docket No. 415.

A. L. Waller v. Cannon Mills Company and Self-Insurer, Docket No. 353.

J. R. Rhodes v. Consolidated Veneer and Panel Company and Travelers Insurance Company, Docket No. 422.

K. P. Phillips v. Home Investment Company and Globe Indemnity Company, Docket No. 388.

R. J. Stroup v. J. M. McGalliard and Globe Indemnity Company, Docket No. 368.

J. D. Waycaster v. Carolina Mineral Co. Inc. and Globe Indemnity Company, Docket No. 438.

Grady Roland v. Atkins & Davis and Consolidated Underwriters, Docket No. 473.

Frank E. Clanton v. Robert M. Perry and Travelers Insurance Company, Docket No. 348.

Rober C. Moses v. Morganton Furniture Company and Maryland Casualty Company, Docket No. 476.

Ira Warlick v. Florence Mills and Liberty Mutual Insurance Company, Docket No. 811.

John F. Allen v. Hursey and Company and Globe Indemnity Company, Docket No. 487.

Carnet Boyer v. Washington Mills Company and Ocean Accident & Guarantee Corporation, Docket No. 407.

Erwin Millsope v. Patton Pole & Timber Company and Great National Insurance Company, Docket No. 468.

Cecil Rice v. Patton Pickett Pole & Timber Company and Great National Insurance Company, Docket No. 508.

W. E. Crisp v. Patton Pickett Pole & Timber Company and Great National Insurance Company, Docket No. 507.

Mrs. Annie Watkins v. Osceola Mills, Inc. and Maryland Casualty Company, Docket No. 449.

Fred Phillips v. Phoenix Utility Company and Liberty Mutual Insurance Company, Docket No. 436.

J. H. Clark v. Parker-Graham-Sexter, Inc. and The Travelers Insurance Company, Docket No. 416.

F. W. Eruger v. Ford Motor Company and Self-Insurer, Docket No. 492.

C. A. Carver v. Carolina Wood Products and Travelers Insurance Company, Docket No. 270.

S. C. Harrell v. Enterprise Lumber Company and Great National Insurance Company, Docket No 404.

N. C. Cody v. Graham Co. Board of Education and Employers Liabilty Assurance Corporation, Docket No. 401.

Fred Millsaps v. Graham Co. Board of Education and Employers Assurance Corporation, Docket No. 402.

N. T. Phifer v. Faremont Dairy, Inc. and Indemnity Insurance Company, Docket No. 380.

J. B. Lyon v. Allen Milling Company and American Mutual Liability Insurance Company, Docket No. 453.

W. B. Cook v. Mooresville Cotton Mills and Maryland Casualty Company, Docket No. 465.

Jesse Robbins v. Deep River Mills Inc. and U. S. F. & G. Company, Docket No. 406.

R. F. Edwards v. Angle-Blackford Company and Globe Indemnity Company, Docket No. 429.

Zeb Myers v. High Point Top and Core Company and Federal Mutual Liability Insurance Company, Docket No. 417.

Herbert W. Thompson v. Duke Power Company and Self-Insurer, Docket No. 385.

Woodford W. Moss v. Southern Public Utilities Company, Self-Insurer, Docket No. 386.

G. W. Edwards v. D. Pender Grocery Company and Maryland Casualty Company, Docket No. 432.

Willis Gent v. Henry Motor Sales Corporation and Hartford Accident & Indemnity Insurance Company, Docket No. 435.

E. M. Williams v. Tomlinson Chair Manufacturing Company and Liberty Mutual Insurance Company, Docket No. 395.

Ray Hendricks v. Manville-Jenckes Company and Union Indemnity Company, Docket No. 428.

Tillman Honeycutt v. Gordon Mills, Inc. and Maryland Casualty Company, Docket No. 361.

J. M. Trutman v. Statesville Manufacturing Company and Liberty Mutual Insurance Company, Docket No. 485.

W. Thomas Klutts v. Hardison & Hardison, Inc. and Travelers Insurance Company, Docket No. 390.

Willie Williams v. Enterprise Lumber & Box Company and Great National Insurance Company, Docket No. 480.

Ithel Dillard v. J. L. Brinkley and London Quarantee & Accident Company, Docket No. 312.

Johnnie Brown v. Enterprise Lumber and Box Company and Great National Insurance Company, Docket No. 484.

J. C. Ratterree v. McClaren Rubber Company and U. S. Casualty Company, Docket No. 466.

L. P. Clayroll v. Statesville Furniture Company and Liberty Mutual Insurance Company, Docket No. 364.

Nora Waddell v. Stonecutter Mills and Liberty Mutual Insurance Company, Docket No. 294.

B. H. Edison v. H. D. Horton and Lumbermens Mutual Casualty Company, Docket No. 470.

D. R. Massey v. J. P. Roberts and Maryland Casualty Company, Docket No. 445.

Max R. Kelly v. Select Tire Service Company and Maryland Casualty Company, Docket No. 72.

SUPREME COURT DECISION

HETTIE H. SMITH, Administratrix of JUNIUS HERBERT SMITH, Jr., Deceased, v. CAROLINA POWER AND LIGHT COMPANY

198 N. C., 614

(Filed April 23, 1930)

1. Master and Servant F h—Dependent Awarded Damages Under Secs. 38 and 40 Workmen's Compensation Act is not Entitled to Award Under Sec. 29.

Construing the Workmen's Compensation Act as a whole to effectuate the intent and purpose of the Legislature, it is held that the purpose of the act is to provide compensation for the employee injured in case the injury is not fatal, and for those dependent upon him in case the injury is fatal, and the last clause of section 29 purporting to provide for the personal representative of the deceased is construed to be repugnant to and irreconcilable with the other provisions of the act, and should be disregarded in giving effect to its other provisions, sections 38 and 40 providing in clear language and comprehensive detail for a full legal method of determining compensation for fatal injuries, and where a dependent has been awarded compensation under sections 38 and 40 she is not entitled to the maximum award as administratrix under section 29.

2. Statutes B a—In Construing a Statute the Spirit of the Act Will Prevail Over the Letter.

Where a section of a statute is repugnant to the spirit of the act and cannot be reconciled by reasonable construction with the language of the other sections conveying and establishing the intent of the Legislature, the repugnant section must give way to the spirit of the act, and will be declared void.

Brogden, J. The Workmen's Compensation Act is built upon two prevailing ideas of compensation and dependency. These ideas are woven into many sections of the statute by clear and explicit legislative declaration. An examination of the act, therefore, discloses a dominant purpose to repair the economic loss sustained by the breadwinner and his dependents, as a result of injury arising in the course of employment. Apparently, the rights of distributees and legatees were not deemed to be of prime importance, if the last clause of the section 29 be excluded from consideration.

The bald question of law presented by the record is whether the last clause of section 29 dominates and directs the interpretation of the act. It is a true saying, and worthy of all acceptation, that "the letter killeth but the spirit giveth life." Indeed, this principle, announced by the world's greatest lawyer, has been recognized and applied to their interpretation of statutes by this Court in the case of *S. v. Scott*, 182 N. C., 865, 109 S. E., 789. *Walker, J.*, expressed it in this fashion: "The spirit, or reason of the law, prevails over its letter. The meaning of general terms may be restrained by the evident object, or purpose to be attained, and general language may be construed to admit implied exceptions, in order to accomplish what was manifestly intended. It is proper to consider the occasion and the necessity for its enactment, and that construction should be given which is best calculated to advance the object by suppressing the mischief and securing the benefits contemplated. If the purpose, and well ascertained object of a statute, are inconsistent with the exact words, the latter must yield to the controlling influence of the legislative will resulting from a consideration of the whole act." To like exect is the utterance of *Adams, J.*, in *Machinery Co. v. Sellers*, 197 N. C., 30, in these words: "It has been said that the letter of the law is its body; the spirit, its soul; and the construction of the former should never be so rigid and technical as to destroy the latter."

Sections 38 and 40, in clear language and in comprehensive detail, provide a legal method of determining compensation for fatal injuries. The last clause of section 29 is totally repugnant to the definite method of settlement prescribed in sections 38 and 40. Moreover, it cannot be merged or blended either with the spirit of the act or the language employed by the Legislature to convey and establish the intent of the lawmaker. Indeed, it is a sort of legal meteor wandering through legal space without substantial relation to any of the bodies which surround it.

The opinion of Commissioner Dorsett, approved by the trial judge, in our opinion correctly interprets the law, and we so hold.

Affirmed.

STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF CONGRESS OF AUGUST 24, 1912,

Of Advance Sheets of Opinions in Cases Heard and Determined by the
North Carolina Industrial Commission, published monthly
at Raleigh, N. C., for April 1, 1930.

STATE OF NORTH CAROLINA,

COUNTY OF WAKE.

Before me, a notary public in and for the State and county aforesaid, personally appeared J. H. Hardison, Vice President, Edwards & Broughton Company, who having been duly sworn according to law, deposes and says that he is the publisher of the Advance Sheets of Opinions in Cases Heard and Determined by the N. C. Industrial Commission and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management, etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, embodied in section 411, Postal Laws and Regulations, printed on the reverse side of this form, to wit:

1. That the names and addresses of the publisher, editor, managing editor, and business managers are:

Publisher—Edwards & Broughton Company, Raleigh, N. C.
Editor—N. C. Industrial Commission, Raleigh, N. C.
Business Managers—Edwards & Broughton Company, Raleigh, N. C.

2. That the owner is: Edwards & Broughton Company, Dr. Chas. Lee Smith, President, Raleigh, N. C.

3. That the known bondholders, mortgagees, and other security holders owning or holding 1 per cent or more of total amount of bonds, mortgages, or other securities are: None.

4. That the two paragraphs next above, giving the names of the owners, stockholders, and security holders, if any, contain not only the list of stockholders and security holders as they appear upon the books of the company but also, in cases where the stockholder or security holder appears upon the books of the company as trustee or in any other fiduciary relation, the name of the person or corporation for whom such trustee is acting, is given; also that the said two paragraphs contain statements embracing affiant's full knowledge and belief as to the circumstances and conditions under which stockholders and security holders who do not appear upon the books of the company as trustees, hold stock and securities in a capacity other than that of a bona fide owner; and this affiant has no reason to believe that any other person, association, or corporation has any interest direct or indirect in the said stock, bonds, or other securities than as so stated by him.

EDWARDS & BROUGHTON COMPANY,
By JOS. H. HARDISON, *Vice President.*

Sworn to and subscribed before me this 11th day of April, 1930.

BESSIE WHEELER.

(My commission expires Jan. 18, 1931.)

(N. P. Seal)

ADVANCE SHEETS

OPINIONS [illegible]

[illegible]

[illegible]

Vol. I Pages 405 to 466 No. 9

ADVANCE SHEETS

OF

OPINIONS IN CASES

HEARD AND DETERMINED
BY THE

NORTH CAROLINA INDUSTRIAL COMMISSION

RALEIGH

JUNE, 1930

OPINIONS TO JUNE 1

SUBSCRIPTION PRICE $5.00 PER YEAR
IN ADVANCE

PUBLISHED MONTHLY FOR THE COMMISSION
BY
EDWARDS & BROUGHTON COMPANY
RALEIGH, N. C.

Entered as second-class matter January 25, 1930,
at the post-office at Raleigh, North Carolina,
under the Act of March 3, 1879.

INDEX

Case *Page*
Harold A. Moore *v.* Department Conservation and Development 405
E. C. Cody *v.* Graham County Board of Education et al. 407
Fred Milsaps *v.* Graham County Board of Education et al. 408
James Underwood et al. *v.* D. S. Hildebrand et al. 409
Eva Jackson *v.* American Enka Corporation et al. 412
S. T. Adams *v.* Cochran & Ross Co., et al. 416
Hubert Christopher *v.* A. A. Shuford Mill Co. et al. 420
James Parker Clouse *v.* Bulen Bryson 422
Mrs. R. F. Burris *v.* Southern Manufacturing Co. et al. 423
William Crawford *v.* Long, Snider & Cogdill et al. 425
J. P. Green *v.* Balfour Mills, Inc., et al. 427
Calvin Edgerton *v.* Lake Lure Lumber Company et al. 429
George W. Oxendine *v.* Rock Creek Jersey Dairy et al. 431
Ben Bates v. The Raleigh Times et al. 433
Will J. Dyer *v.* Carolina Wood Products Co. et al. 435
C. C. Dale *v.* Observer Printing House et al. 436
Marvin Johnson *v.* City of Gastonia et al. 438
J. O. Thompson *v.* E. H. Clement Co. et al. 441
R. E. Burns *v.* Rockwell Casket Co. et al. 457
Supreme Court Decision (Conrad *v.* Cook-Lewis Foundry Co. et al.) 464

NORTH CAROLINA INDUSTRIAL COMMISSION

MATT H. ALLEN, CHAIRMAN
J. DEWEY DORSETT
T. A. WILSON
COMMISSIONERS

E. W. PRICE, SECRETARY

ELEVENTH FLOOR RALEIGH BANK & TRUST BUILDING
RALEIGH, N. C.

[Docket No. 413]

HAROLD A. MOORE, Employee, Plaintiff, v. DEPARTMENT OF CONSERVATION AND DEVELOPMENT, Employer, Self-Insurer, Defendants

Filed May 8, 1930

Average Weekly Wages.—Unfair to claimant and would work great hardship to calculate average weekly wages of forest fire fighter on basis other than what he would earn in civilian employment.

This was a claim from Buncombe County, N. C., for compensation for loss of an eye by the claimant in fighting a forest fire; heard before Allen, Chairman, North Carolina Industrial Commission, at Asheville, April 17, 1930, 2:30 p.m., office Clerk Superior Court.

Plaintiff represented by *M. A. James*, Attorney, Asheville, N. C.
Defendants represented by J. S. Holmes.

Opinion by Allen, Chairman.

It was admitted that the plaintiff was in the employment of the Department of Conservation and Development at the time of the injury; that the accident arose out of and in the course of the employment; and leaving for determination only the one question, to wit: the amount of the average weekly wage of the claimant.

Statement of the Case

The claimant was an electrician by trade, and had been receiving from 87½c to $1.50 per hour for his labor. On the date of the alleged accident the claimant, with two other boys, while engaged in putting out a forest fire on the premises of his grandmother, was summoned by Everett Bryson, Fire Warden, for the District, to assist in extinuishing another forest fire in the same vicinity, and while so engaged a piece of brush accidentally struck him in the left eye, causing a complete loss of vision.

It appears that the claimant was engaged in assisting the Fire Warden for a period of five hours, for which he was paid at the rate of 20c per hour, or a total of $1.00.

The Fire Warden, Everett Bryson, testified that he summoned the plaintiff in pursuance of the authority given him by Section No. 6137, of the North Carolina Code.

Sub-section (e) of Section 2, of the Compensation Act, provides for average weekly wage. The question to be determined is the average weekly wag on which compensation is to be based.

The defendant contends that compensation should be based either upon the weekly wage received by the claimant, while serving as an Assistant Forest Warden, or upon the weekly wage of the Forest Warden who summoned him.

The claimant contends that the 20 cents per hour paid by the Department of Conservation and Development to persons summoned to fight fires, or the pay of a Forest Warden, should not be considered in determining the average weekly wage on which his compensation is to be based; and he contends that his compensation should be based upon the weekly wage received by him in his civil vocation.

Findings of Fact

Upon consideration of all of the evidence, the Commissioner finds as a fact:

1. That at the time of the accident the claimant was acting as Assistant to Everett Bryson, who was the duly appointed Forest Warden for the particular district, and who had summoned the claimant in pursuance of the authority given him by Section 6137 of the North Carolina Code.
2. That while so engaged the claimant was injured in the eye, which resulted in the complete loss of vision.
3. That claimant was engaged as assistant, under summons, of the Forest Warden in the extinguishment of the forest fire for the period of five hours, for which he received compensation at the rate of 20 cents per hour.
4. That the average weekly wage of the claimant in his civil vocation exceeded $30.00 per week.
5. That it is impracticable to compute the average weekly wage of this claimant in accordance with the general rule of sub-section (e), section 2; and that the application of said rule to the instant case would be unfair to the claimant on account of the exceptional circumstances of his employment.

It would be eminently unfair and would work a great hardship on this claimant to calculate his compensation on either the pay he received while assisting the Forest Warden in fighting the fire, or on the pay of the Forest Warden whom he was assisting.

This claimant was receiving in his civil vocation approximately $200.00 per month. He was summoned to assist the Forest Warden, and upon his refusal he would have been subject to indictment. During the course of his employment he received a permanent injury, and as we see it, the loss which is to be made good is the loss sustained by the claimant in his civil employment.

Award

It is, therefore, ordered that an award issue providing for the payment of compensation to the claimant of the sum of $18.00 per week, for a period of 100 weeks, plus all medical and hospital bills, including an artificial eye, as provided by Section 25 of the Act.

[Docket No. 401]

E. C. CODY, Employee, Plaintiff, v. GRAHAM COUNTY BOARD OF EDUCATION, Employer, and EMPLOYERS LIABILITY ASSURANCE CORPORATION, Carrier, Defendants

Filed May 5, 1930

Leaving Work.—School teacher on road, returning home after school hours is subject to same hazard on country road as are all persons. Claim denied.

This was a claim from Graham County, for injuries received by the claimant, who was a school teacher, in charge of a rural school, at a salary of $85.00 per month; heard before Allen, Chairman, North Carolina Industrial Commission, at Robbinsville, on April 21, 1930.

Plaintiff represented by *R. B. Morphew*, Attorney, Robbinsville, N. C.
Defendants represented by *A. B. Dreher*, Attorney, Greensboro, N. C.

Opinion by Allen, Chairman.

Statement of the Case

It appears from the evidence that on September 20, 1929, in going from the school premises along a mountain road to his home, the claimant stepped on a slick rock and fell to the ground, breaking his left little finger; that as a result of said injury claimant has lost 25 per cent of the use of said little finger; that report of the accident was not filed with the Industrial Commission until February 8, 1930; that the claimant did not consult a doctor about his injury until January, 1930, more than three months after the accident.

Findings of Fact

Upon all of the evidence the Commissioner finds as a fact that the accident sustained by the plaintiff did not arise out of and in the course of his employment, and orders the claim dismissed.

Conclusions of Law

As a general rule an injury suffered by an employee when going to or returning from work does not arise out of the employment, and there appears to be no particular circumstances in this case to take it out of the general rule.

When the work for the day is ended, and the employee has left the premises of the employer to go to his home, the liability of the employer ceases, unless after leaving the premises of the employer the employee is incidentally performing some act for the employer under his contract of employment.

It is clear from this record that the accident occurred off of the premises of the employer, and this being true, his employment was not continued beyond the school premises.

1 Honnold on Workmen's Compensation, p. 122; Bradberry on Workmen's Compensation (3d Ed.), p. 473; Elliott on Workmen's Compensation (7th Ed.), p. 41.

If this employee had been injured while returning from his work in a conveyance furnished by the employer, under his contract of employment, the situation might be entirely different.

The hazards of this county road were common to all persons alike, and not peculiar to the employment.

Smith v. Hinkelstein Co., Inc., 10 O.I.C.V.A., p. 60.

[Docket No. 402]

FRED MILSAPS, Employee, Plaintiff, v. GRAHAM COUNTY BOARD OF EDUCATION, Employer, EMPLOYERS LIABILITY ASSURANCE CORPORATION, Carrier, Defendants

Filed May 5, 1930

PERSONAL MISSION.—School teacher returning from home to his school district after having been on a personal mission, sustains injury, it does not arise out of employment.

This was a claim from Graham County, N. C., for compensation by a rural school teacher, drawing a salary of $70.00 per month; heard before ALLEN, Chairman, North Carolina Industrial Commission, at Robbinsville, on April 21, 1930.

Plaintiff represented by *R. B. Morphew*, Attorney, Robbinsville, N. C.
Defendants represented by *A. B. Dreher*, Attorney, Greensboro, N. C.

Opinion by ALLEN, Chairman.

Statement of the Case

It appears from the evidence that on Friday afternoon, January 24, 1930, the claimant left his school district for a week-end trip to his home, about twenty-one miles distant, in a hired automobile; that on returning from his home to the Graham County School District on Sunday afternoon following, the automobile skidded over an embankment, on account of the slick roads, resulting in the fracture of the claimant's arm.

The claimant contends that he was in line of duty because it was the general custom of rural school teachers in that section of Graham County to leave their boarding houses over the week-end, with the knowledge and approval of the School Board, which custom was admitted.

Findings of Fact

Upon the foregoing the Commissioner finds as a fact that the accident and injury to the plaintiff did not arise out of and in the course of his employment, and orders the claim dismissed.

Conclusions of Law

To come within the term "injury received within the course of employment" it must be shown that the injury originated in the work, and further that it was received by the employee while engaged in or about the furtherance of the affairs of the employer.

Indemnity Co. v. Jenkins, 211 S.W., 949; 18 N.C.C.A., 1034; *In re Julius Rosenberg*, 2d A.R.U.S.C.C., 263; *Kirby Lumber Co. v. Scurlock*, 229 S.W., 975.

An employee who is paid by the hour was furnished a bicycle for the work and while riding home one evening on the main road he was run into and killed by a motor lorry. It was held that since it was no part of his duty to ride home on the bicycle, the accident did not arise in the course of his employment.

Edwards v. Wingham Agriculture and Implement Co. (1913), W. C. and Ins. Rep., 642, 109 L.T. Rep., 50; 82 L.J.K.B., 998; 6 B.W.C.C., 511; 4 N.C.C.A., 115; *Cook v. Owners of Montreal*, 108 L.T.Rep., 164; 29 T.L.Rep., 233, 6 B.W.C.C., 220 (1913); 4 N.C.C.A., 115.

An employee had quit work and left the premises. He was sitting in his buggy waiting for his son when the horse took fright and ran away. It was held that the injury sustained in the runaway did not arise out of and in the course of employment.

In re McCall, Ohio I.C., No. 121401, Nov. 4, 1915.

If the plaintiff in this case had been returning to his work, which is not the fact, he would come clearly within the rule that an injury suffered by an employee while going to or returning from work does not arise out of the employment. This employee was on a mission of his own, and he has failed to show any connection between the employment and the accident.

Hills v. Blair, 182, Mich., p. 20; 148 N.W., 243; 7 N.C.C.A., 409.

[Docket No. 260]

JAMES UNDERWOOD, Deceased, Employee; JULIA UNDERWOOD, Administrator, et al., Plaintiffs, v. D. S. HILDEBRAND, Employer, and U. S. CASUALTY COMPANY, Carrier, Defendants

Filed May 7, 1930

DEPENDENCY.—In determining dependency of mother upon minor son, the amount furnished by the mother out of the son's contributions towards maintenance of son cannot be deducted in arriving at percentage of depedency.

STEPPING ASIDE.—Where course of employment departed from under direction of a superior with authority over him, the departure cannot be imputed to the injured person.

This is a claim from Buncombe County, N. C., for injuries resulting in the death of James Underwood, in an automobile wreck on the 2d day of

January, 1930; heard before ALLEN, Chairman, North Carolina Industrial Commission, at Asheville, on February 5, 1930.

Defendants represented by *J. Bat Smithers*, Attorney, Asheville, N. C.
Plaintiffs represented by *Sanford W. Brown*, Attorney, Asheville, N. C.

Opinion by ALLEN, Chairman.

It was admitted that this claimant was in the employ of the defendant at the time of the alleged injury and death, and that the accident arose out of and in the course of the employment.

Statement of the Case

It appears from the evidence that the deceased at the time of his death was in the employ of D. S. Hildebrand, who was engaged in the manufacture and sale of brick; that said D. S. Hildebrand as such employer owned three trucks with which brick were delivered from the brick yard, at Brickton, Henderson County, to points in the surrounding territory; that one Ossie Bishop was the driver of one of the trucks, and the deceased, James Underwood, a helper, whose duty it was to assist in the loading, accompanying the truck to its destination, and unloading the brick; and that he was at the time of the accident detailed to the truck driven by Ossie Bishop; that on the 2d day of January, 1930, Ossie Bishop was directed by the employer to deliver a truck load of brick to Wilson's Siding, between Asheville and Swannanoa; that the deceased, and Claude V. Brown, Assistant Manager for D. S. Hildebrand, accompanied the said truck, driven by the said Ossie Bishop, the deceased, James Underwood, for the purpose of unloading the brick, and Claude V. Brown ostensibly for the purpose of transacting some business for the employer, either in the collection of accounts or to solicit sales of brick from customers on the route; that after the load of brick had been delivered, and while the truck was on its return trip on Route 20, near the town of Biltmore, N. C., it was overturned, resulting in the death of James Underwood and Claude V. Brown.

It also appears from the evidence that the deceased, for the year immediately preceding his death, earned an average weekly wage from his employer, D. S. Hildebrand, of $5.32 per week, but it appears that during the year his employment was irregular, due to depression in the brick business, and that while not engaged in the services of this employer the deceased worked elsewhere in the neighborhood at intervals, when he could secure other employment.

Julia Underwood, mother of the deceased, testified that the deceased provided support for herself and little daughter; that he gave all of his income to her, and she would at times give some of it back to him for necessaries; that he generally gave her the pay envelope with all of his earnings; and that her other children did not contribute in any manner to her support.

Findings of Fact

From the foregoing testimony the Commissioner finds as a fact:

1. That the accident which caused death of James Underwood arose out of and in the course of his employment.

2. That the mother of the deceased, James Underwood, was at the time of his death and for more than three months prior thereto, dependent upon the earnings of the deceased, for the support of herself and infant daughter, to the extent of his entire earnings, which amounted to an average of $5.32 per week, and that she had no other means of support except occasional contributions from other children who were not living with her, and that therefore she was wholly dependent upon the deceased.

3. That the deceased at the time of his death was seventeen years of age, unmarried, and left no persons conclusively presumed to be dependent upon him.

Conclusions of Law

The defendants contend that the mother of the deceased is only entitled to recover sixty per sent of the amount contributed to the mother, after deducting the maintenance of the deceased; and that according to the testimony of the mother approximately $1.32 per week of his earnings were used to purchase clothing and maintain the deceased, leaving about $4.00 per week net to the mother, and that the Award herein should be for sixty per cent of $4.00, or $2.40 per week for a period of three hundred and fifty weeks.

The cost of the maintenance of a contributing minor son should not be considered in determining the amount of compensation to which the dependent mother is entitled.

In re Peters (Ind.), 116 N.E., 848; *In re Buckley*, 218 (Mass.), 354; *In re Carter*, 221 (Mass.), 105; *In re Caliendo*, 219 (Mass.), 498; *Grove v. Royal Indemnity Co.*, 223 (Mass.), 187; *In re Murphy*, 218 (Mass.), 278; *Griffin v. McClellan Store*, 1 O.N.I.C., p. 144; *Griffin v. McClellan Stores*, 1 O.N.C.I.C., p. 308.

It was contended by the defendants that at the date of the accident the truck on which the deceased was riding had departed from the master's business, and that such interruption of the course of employment has the legal effect of suspending the master's responsibility. Without undertaking to pass at this time upon the legal effect of a deviation by the servant, the authorities seem to be uniform in holding that where the injured person is in company with others who have authority over him, such deviation or departure can not be imputed to such injured person.

Hartford Accident and Indemnity Co. v. Durham, (1920) Tex. City App., 222 S.W., 275; Pollock on Torts, p. 76, E.T.S.E.Q.; *Tyree v. Tudor*, 183 N.C. 346, and cases cited.

The claimant, Julia Underwood, mother of the deceased, testified that the deceased gave her all he made, and that she occasionally gave a part of his wages back to him to purchase necessary clothing and shoes; that the deceased paid house rent at times and that when he was not working for the defendant company he would secure other work in the neighborhood; that she was a widow with one daughter and two sons, the deceased James Underwood, and George Underwood; that her son George made occasional contributions to her but had not given her any money for the past two years.

Upon the foregoing testimony the Commission is of opinion and finds that the claimant, Julia Underwood, was wholly dependent upon her son, the deceased.

Total dependency exists where persons coming within the statutory classification of "who may be dependents" subsist entirely upon the earnings of the workmen, irrespective of the fact that in the absence of the assistance such person or persons would be able to support themselves, and it is immaterial that gratuitous contributions from other persons are occasionally received.

Petrozino v. American Mutual Liability Co., 219 (Mass.), 498; 107 N.E. 370; 9 N.C.C.A., 594; *State ex rel. Splady v. District Court of Hennepin Co.*, 128 (Minn.), 338; 151 N.W., 123; 9 N.C.C.A. 580; *Kennerson v. Thames Towboat Co.*, 89 (Conn.), 367; 94 Atl., 372; L.R.A., 1916-A, 436.

Where invalid parents were totally dependent upon their deceased son for support the mere fact that a daughter, who had been paid for keeping house for them had, prior to the son's death, ceased to exact compensation for her services, would not be sufficient to render them only partially dependent. *State ex rel. Splady v. District Court of Hennepin County*, 128 (Minn.) 33, 1551; N.W. 123, 9 N.C.C.A., 580.

Mere gratuitous remittances by an aunt and a sister are not sufficient to prevent an award for total dependency of a mother and sister otherwise wholly dependent upon the deceased. *Petroziano v. American Mutual Liability Co.*, 219 (Mass.) 498; 107 N.E. 730; 9 N.C.C.A., 594.

Award

It is ordered that an award issue providing for the payment of compensation to the claimant, Julia Underwood, mother of the deceased, at the rate of seven dollars per week for a period of three hundred and fifty weeks plus funeral expenses not to exceed two hundred dollars.

[Docket No. 94]

EVA JACKSON, Employee, Plaintiff, v. AMERICAN ENKA CORPORATION, Employer, and TRAVELERS INSURANCE COMPANY, Carrier, Defendants

Filed May 8, 1930

PROLAPSUS.—Where evidence fails to show causal connection between an injury by accident and misplacement of womb, claim denied.

NEWLY DISCOVERED EVIDENCE.—Rule of Commission must be met before rehearing will be granted to introduce additional evidence.

Hearing before the Full Commission at Raleigh, N. C., on March 25, 1930.

Plaintiff not represented by counsel.
Defendants represented by *Biggs & Broughton*, Attorneys at Law.

Opinion for the Full Commission by DORSETT, Commissioner.

The record in this case is very voluminous. Two hearing were had in the matter before a single Commissioner. The first hearing was conducted by WILSON, Commissioner, at Asheville, on November 29, 1929. He denied the plaintiff compensation. Some few days after the award was sent out to the parties to this proceeding, counsel for the plaintiff requested a review before the Full Commission, and in his letter of February 7, 1930, he notified the Commission that he desired to introduce some new evidence before the Full Commission.

In order to save the expense of the witnesses in coming to Raleigh and appearing before the Full Commission, it was decided that another hearing would be given the plaintiff at Asheville.

Counsel for the plaintiff contended that in asking that he be permitted to introduce new evidence that he expected to prove by one Dr. R. L. Stokes of Brevard, N. C., that the plaintiff was suffering from a misplacement of the womb, causing practically all of her trouble, and that this misplacement could not have occurred except through a wrench or twisting of the body. The plaintiff contended that she could prove by additional witnesses that the baskets she was required to lift were stacked as high as she could reach and that the misplacement of her womb was the result of bringing the baskets down. She further contended that she expected to prove that at another particular time, while lifting a certain particular basket, she felt a giving away or breaking loose of something in the region of her diaphragm.

Commissioner Wilson also conducted the second hearing on March 13, 1930, and the entire record of this case is now before the Full Commission. At the hearing of the Full Commission the plaintiff was not represented nor has she filed a brief in this case.

Commissioner Wilson denied compensation after the first hearing on the ground that the plaintiff had failed to sustain the burden of proof placed upon her to prove that she suffered an accident that arose out of and in the course of her employment resulting in the disability complained of.

The Commission has carefully reviewed the evidence, not only in the first hearing but also in the second hearing and are of the opinion that the plaintiff has failed to make out a case. The record in the second hearing constitutes, for the most part, a re-hashing of the evidence in the first hearing. The Doctor Stokes, by whom the plaintiff was going to prove certain things, was present at the second hearing but was not called upon to testify. He was subpoenaed there by the plaintiff. At the first hearing Doctors Orr, Willis and Herbert testified. At this hearing Dr. Orr was not at all certain that there was any connection between the condition in which he found his patient and the accident she alleges to have suffered. Doctor Herbert could find no connection between the alleged accident and the condition in which he found the plaintiff. The testimony of Doctor Willis is not material. He merely, in a formal way, inspected the employees for the employer, defendant, before they began their work. He made no examination of the plaintiff after the alleged accident.

At the second hearing Doctor Orr seems positive in his testimony that there is a causal connection between the disability complained of and the accident she alleges to have suffered while employed by the defendant, employer, on September 23, 1929. The Doctor practically 'about faces' in his testimony. Doctor Herbert, however, is still of the opinion that the plaintiff is suffering from natural causes, *i.e.*, from some mal position of her womb and other female troubles not connected with her work.

We believe that the testimony of the plaintiff at the first hearing is significant. She testified that because of an injury to her finger, which was not connected with her work, she was moved from her regular job to that of carrying certain baskets. She was absent from her work for about a week as a result of the said injury to her finger and when she returned to her work she was assigned to a different job because of the injury to her finger, and that different job was that of carrying baskets as described above. She went on this new job on the 21st of September, which was on Saturday, and worked a half day. She testified that she returned to work on Monday; that she was feeling bad and that every time she lifted a basket she thought she would die. In her own words she said: "I was sick that morning and commenced to feel bad every time I lifted a basket. I nearly died. It seemed like every time I picked up a basket or bent down, everything would come down with the basket."

From all the evidence in the two hearings, the Full Commission makes the following

Findings of Fact

1. The parties, plaintiff and defendants, are bound by the provisions of the North Carolina Workmens Compensation Act of 1929; the Travelers Insurance Company, intervening as a party, is the insurance carrier for the defendant.

2. The disability complained of by the plaintiff is not the result of an accident that arose out of and in the course of her employment by the defendant, her employer.

Conclusions of Law

The Commission can not see that the facts brought out at the second hearing constitute any newly discovered evidence as that term is ordinarily used. The facts, in our opinion, do not call for any different decision of the case than was originally made.

Counsel for the plaintiff has presented the matter in the most favorable light from the plaintiff's standpoint and has exhausted every effort to present the whole matter before the Commission. The facts appear fully developed but the Commission finds itself unable to draw the conclusions from such facts that is drawn by counsel for the plaintiff.

The burden of proof is upon the plaintiff to prove by a preponderance of the evidence, and certainly by a greater weight, that the injury complained of was the result of an accident which occurred in the course of and arose out of employment. Plaintiff, in the instant case, has failed to sustain the burden of proof in establishing in the first place that she met with an accident as contemplated by the North Carolina Workmens Compensation Law.

"The Liability of an employer under the Compensation Act can not be based on a choice between two views equally compatible with the evidence but the liability must be based upon facts established by the evidence, and where the cause of the death or injury is equally consistent with an accident, and with no accident, compensation will be denied." *Ryan v. Industrial Commission*, 329 Ill., 209; 601 N.E., 353.

The ultimate purpose of the Workmen's Compensation Act is to treat the cost of personal injuries incidental to the employment as a part of the cost of the business. It does not afford compensation for injuries or misfortune which are merely contemporaneous with the employment or collateral to it. The essential connecting link of direct causal connection between the injury and the employment must be established before the Act becomes operative. The injury must be the result of the employment and flow from it as the inducing, approximate cause. The rational mind must be able to trace the injury to an approximate cause set in motion by the employment and not by any other agency or there can be no recovery.

In the instant case the plaintiff has not established her claim by clear and satisfactory evidence. Clear and satisfactory evidence is evidence which convinces the mind or conscience of the person or body hearing the case of the truth of the contentions. If it fails to convince the tryer that the effect or result claimed really existed or happened, then a finding to that effect cannot be made. In other words, the party alleging such fact or result has failed to discharge the burden of proof. It is not enough that evidence has been offered which tends to prove the fact or result. It is not proved until the tryer is convinced that the fact or effect actually existed.

The Commission has found it absolutely essential to establish a definite rule concerning the taking of additional testimony. Nowhere is it shown or contended in the second hearing had in this matter that the evidence now relied upon was not available at the time of the original hearing. An examination of the record in this case shows that a most patient effort was exercised to establish as accurately as possible the claimants contentions and every opportunity was afforded her to establish all facts relating thereto. No error is found in either the findings of fact or conclusions of law as presented in the opinion rendered by Commissioner Wilson. The formal rule of the Commission governing the reopening of cases after hearing has once been had, an opportunity given each side to present its case, will be found on page twenty-eight of the bulletin issued by the North Carolina Industrial Commission. The rule reads:

"When, in the discretion of the Commission, additional evidence is necessary for the completion of the record in a case on review, the Full Commission will, in its discretion, order the taking of such evidence before one Commissioner. When either the employer or employee seeks to introduce new evidence at the review, application must be made for the introduction of new evidence, and it must be shown that the new evidence is of such a character as would follow the Common Law governing the admission of newly discovered evidence in the application for a new trial. The evidence sought to be introduced must not be evidence of cumulating or impeaching character, but must be of such a character as likely would have produced a different result had the evidence been procurable at the first hearing. It must be shown that the evidence was not known to the party who desires to introduce same at the time of the hearing before the Commissioner, and that by reasonable diligence this new evidence could not have been secured. In other words, the law of North Carolina as to the nature and character of evidence required for the granting of new trials, will be applied by the North Carolina Industrial Commission before new evidence can be introduced in a review by the Full Commission.

It was precisely this situation which was meant to be covered by the rule of this Commission above quoted. Parties are expected to present their claims, and are given the full opportunity of so doing. However, when they have had one such opportunity, the requirements of the law have been met and their rights protected and the Industrial Commission has found it necessary to stand strictly upon the rule quoted, otherwise, its work could not be accomplished.

For the reasons set forth above it is directed that an award be made denying compensation and dismissing the case. Each party will pay its own cost.

[Docket No. 414]

S. T. ADAMS, Employee, Plaintiff, v. COCHRAM & ROSS COMPANY, Employer, and U. S. CASUALTY COMPANY, Carrier, Defendants

Filed May 9, 1930

Refusal of Medical Aid.—Where employer has tendered services of physician and surgeon licensed by the Medical Board, refusal to accept services not justified where finding is that physician is competent and compensation denied during period of refusal.

Qualification of Physician.—Supreme Court's dicta as to qualifications to be possessed by physician or surgeon used as test of ability and learning required of practitioners in industrial accident cases.

Hearing before Dorsett, Commissioner, at Charlotte, N. C., on May 1, 1930.

Plaintiff represented by *John G. Newitt,* Attorney at Law.
Defendant represented by *Ralph V. Kidd,* Attorney at Law.

Opinion by Dorsett, Commissioner.

Statement of the Case

This case presents an unusual question, and one which, according to the editor's note in 40 A.L.R. 1264, has not been passed upon by the Courts of the Country in but one other case.

A hearing was had on April 4, 1930, before the Commissioner, whereupon an opinion was filed in which the following findings of facts were made:

1. The parties to this proceeding are bound by the provisions of the North Carolina Compensation Act; the United States Casualty Company is the carrier; that this accident arose out of and in the course of the plaintiff's employment.

2. The plaintiff suffered an accident on October 31, 1929, while regularly employed by the defendant, which resulted in serious injury to his back, causing his disability since the date of the accident.

3. The average weekly wage at the time of the accident was $13.50 per week.

4. The employer has had sufficient notice of the accident, and his rights have not been prejudiced by lack of notice.

5. The plaintiff has not been able to work since the date of the accident, and is still disabled.

Upon all the evidence, including that taken upon the formal hearing, the Commission makes the following

Findings of Fact

1. That the findings made and incorporated in the opinion filed April 17, 1930, quoted above, are in accord with the evidence and are hereby affirmed and adopted for the purposes of this opinion.

2. That in compliance with the award issued April 18, 1930, the defendants tendered the services of Dr. E. R. Hipp.

3. That up to the date of the hearing conducted May 1, 1930, the plaintiff had refused to accept the tender of the services of Dr. E. R. Hipp.

4. That the plaintiff was warned at this hearing that if he wanted compensation he should accept Dr. Hipp's services.

5. That the refusal of this tender of medical treatment was not justified.

6. That Dr. E. R. Hipp is a duly licensed and practicing physician and surgeon in the state of North Carolina.

7. That Dr. E. R. Hipp has practiced medicine since 1919, having graduated at the University of Virginia after four years study. After this he had two years work as interne, he is a member of the American College of Surgery, admission to which is conditioned on having eight years surgical work, and performing at least one hundred major operations.

8. That Dr. E. R. Hipp has specialized in industrial surgery.

9. That Dr. E. R. Hipp is competent to render the surgical and medical attention required in this case and in tendering the services of Dr. Hipp, the defendants have complied with the requirements of Section 25 of the Act and the award of April 18, 1930.

10. That no ethical rules of the medical profession appear in this record.

Upon the foregoing findings of fact are based the following:

Conclusions of Law

Section 25 of the Act places the obligation upon the employer to furnish to employees injured by accident arising out of and in the course of employment, medical, surgical, hospital and other treatment as may be reasonably required for a period of ten weeks after the injury, and thereafter for such term as ordered. A refusal to accept such tender by the employee is a bar to his right to compensation unless such refusal was justified, in which case the Commission may order a change in medical or hospital service.

In the preface hereto, it was stated that only one case had been reported in which a similar question was involved.

In *Stanley Towers v. Glider & Levin*, 40 A.L.R., 1264, was involved the question of competency of an osteopath to fulfill the requirements of the statute requiring the services of a "physician," and does not throw much light upon our point.

Our Court has, in numerous suits, predicated upon malpractice, set out the proper rule for instructing the Jury upon the question of skill and competency of physicians and surgeons.

In *Boone v. Murphy*, 108 N.C., 167, it was said: "Instructions that, 'ordinary skill is the skill which a surgeon would under the circumstances of the case reasonably use in treating cases' is not erroneous."

In *Mullinax v. Hord*, 174 N.C., 607, it was held: "Absolute accuracy is not required of physicians or surgeons either in practice or judgment, exercise of that degree of knowledge and skill ordinarily possessed by members of the profession being sufficient."

In *Macrocam v. Smathers*, 122 N.C., 799, it was stated: "A physician and surgeon holds himself out to possess, and will be held to apply, the degree of learning and skill ordinarily possessed by his profession existing at the time of his practice, and not what may have existed prior thereto."

In passing upon the ability and skill required of a physician and surgeon to be furnished by an employer under Section 25, our Court would certainly not require this Commission to have such persons meet a test greater than the rules expressed in the opinions cited.

Upon the facts in this record, this Commissioner must conclude that the learning and experience of Dr. Hipp, qualifies him as a competent physician and surgeon, eminently qualified to treat this plaintiff.

One serious question presents itself, and about which this Commissioner is not entirely satisfied in disposing of this case. The duty of ordering a change of medical and hopital service is placed upon the Commission when justified by the circumstances. Thus is effect having a layman as is this Commissioner, pass upon the qualifications of a member of a profession, ranking among the highest of all professions, the requirements of its members being so involved in technical skill and scientific learning that strict rules are prescribed for practice. The ministration of its members affect the highest and lowest, the rich and poor, and is so interwoven with our advent into this life and departure therefrom, that few pass through this sphere without coming into intimate contact with its members.

The Legislature realizing that the public welfare was so dependent upon the expert skill of the medical practitioner and recognizing its impotency to lay down rules for the licensing and regulation of practice of the medical fraternity, has by statute C.S. 6606, *et seq.*, prescribed that license should only be issued after the applicant has passed an examination prescribed by a Board of Medical examiners, composed solely of members appointed by the Medical Society. The profession is therefore charged with the duty of seeing that a licensed physician and surgeon has the skill and ability required before procuring license.

Dr. Hipp, being a licensed physician, such license having been issued upon meeting the requirements of the Medical Board, it may be presumption upon the part of this Commissioner to conclude upon the evidence in this case that issuance of the license was or was not justified.

The plaintiff's counsel would have the Commission take Judicial notice of ethics of the medical profession. This Commission will take Judicial notice of the fact that the medical profession has certain rules or ethics, probably many such rules are of common knowledge and have been in effect since the time of Hippocrates. However, such rules of ethics are not of such common knowledge as to compel that any Judicial notice be taken thereof. Recently a popular magazine contained an article on this subject; however, such a publication does not bring these rules of ethics within the scope of matters of which Judicial notice may be taken. One rule of ethics of the medical profession, if such, as quoted therein, will bear recording:

"That into whatsoever house you shall enter, it shall be for the good of the sick, to the utmost of your power, you holding yourself far aloof from wrong, from corruption, from the tempting of others to vice."

The plaintiff's counsel contends that the family physician should be ordered furnished rather than a member of a clinic. The Commissioner does not care to enter into a discussion over a matter that he understands is being seriously debated by the Medical Board.

For the reasons assigned, it is directed that there issue the following

Award

The plaintiff is directed to accept the services of Dr. E. R. Hipp as attending physician and surgeon, and upon refusal to do so the payment of compensation provided for in the award of April 18, 1930, shall cease and terminate.

Since writing the above, the Commissioner has read a memorandum from an opinion handed down March 27, 1930, by the Appellate Division of the New York Superior Court in the case of *Peterson v. Erie R. R.* (no citations to report), in which case claimant fell "from a scaffold, caused fracture of railroad shop employee's left radius and sprain of his left wrist. He refused diathermy treatment by the railroad company's physician. He based his refusal on lack of confidence in his employer's physician, testifying that said physician had given the same treatment to his, the claimant's, mother for rheumatism without effecting improvement in her condition. The referee hearing the case awarded $164.00 to him for the diathermy treatment upon a finding that his refusal of the company physician's services had been reasonable. The referee's position was that the patient must have confidence in the practitioner to get the best results. The Industrial Board affirmed the referee's action. Upon appeal, the Appellate Division has reversed the award and dismissed the claim, with opinion saying that the employer had not made unreasonable selection of a physician and that the physician giving the treatment had not reported within twenty days in compliance with Section 13 of the compensation law.

The above seems to sustain the Commissioner's opinion herein.

[Docket No. 326]

HUBERT CHRISTOPHER, Employee, Plaintiff, v. A. A. SHUFORD MILL COMPANY, Employer, and U. S. CASUALTY COMPANY, Carrier, Defendants

Filed May 17, 1930

ARISING OUT OF AND IN THE COURSE OF.—Where workman intervenes and does something useful or helpful to the master, although outside the special duties of employment, the legislature intended language to cover broader scope and not limit right to compensation to injuries sustained "when doing the work he was employed to perform."

This was a claim from Catawba County, North Carolina, for the loss of an arm by the plaintiff, who was a lad seventeen years of age; heard before ALLEN, Chairman, North Carolina Industrial Commission, at Newton, on April 25, 1930, office Clerk of the Superior Court.

Plaintiff represented by *J. L. Murphy*, Attorney, Hickory, N. C.
Defendants represented by *Ralph V. Kidd*, Attorney, Charlotte, N. C.

Opinion by ALLEN, Chairman.

Statement of the Case

It appears from the evidence that the claimant, a lad seventeen years of age, was employed by the A. A. Shuford Mill Company October 4, 1929, and while engaged in operating a waste machine, and in an effort to unchoke the machine, his left arm was caught in the machine and torn off above the elbow.

The defendants contend that the claimant is not entitled to compensation because he was employed, as they contend, to chop the waste and not to run the machine.

The plaintiff testified that on October 4, 1929, one Will Price, who was a boss at the Shuford Mills, sent for him to come to work; that he asked Price who was going to run the machine, and that Price replied that he (claimant) could run it; that he worked at the machine until five o'clock in the afternoon; that the machine became choked up, and he undertook to unchoke it; that he thought the machine had stopped when he endeavored to unchoke it; that his hand was caught in the machine, and his arm torn off; that during the afternoon, and while he was at work running the machine Mr. Price, who employed him, passed through the room in which he was working; that there are three waste machines in the room in which he was working, one being operated by a Mr. Harrison, an elderly man, and another by one John Isaacs; that during the time that he, the claimant, was running one of the waste machines, Mr. Harrison was running the other; and Henry Hawn testified that on the afternoon of October 4, 1929, while he was at work in the Shuford Mills he saw the claimant chopping waste and running the machine.

The defendants offered witness, W. J. Crantz, who testified that he did not send the claimant to run this waste machine. The defendants further offered witness, A. B. Harrison, who testified that his duties were to run the waste machines, and that at the time of the accident he was running a waste machine; that he asked the claimant to chop the waste. On cross-examination he testified that he was in the room with the claimant and saw him running the machine; that there are three waste machines; that the claimant did run one of the machines that evening; that the hard waste had accumulated and there was so much of it that he could not keep up with it, and had requested that someone be sent to chop it up.

Findings of Fact

Upon the foregoing evidence the Commissioner finds as a fact:

1. That the accident and injury to the claimant arose out of and in the course of the employment.
2. That the average weekly wage at the time of the accident was less than $12.00 per week.
3. That the plaintiff was totally incapacitated on account of the injury to his arm for a period of 28 days, immediately following the injury.

Conclusions of Law

The contention of the defendants that the claimant was injured at a place where he was not employed to work is not supported by the testimony. It is true that the defendants offered testimony of one Crantz, who said that he did not send the plaintiff to run the waste machine, and of one Harrison, who testified that he was employed to run one of the three waste machines. This testimony is negative, and has little weight. The plaintiff on the other hand testified that he was sent for by one Will Price, a boss at the mill, and was told to chop the waste and run the machine.

It appears from the evidence of all of the witnesses that the plaintiff did chop waste and run the machine for a period of about five hours, in the presence of matured men, and in the presence of the boss who sent for him, without one word of protest or warning, but with the tacit approval of the master. Will Price was not offered as a witness to contradict the claimant, and his absence was conspicuous and is significant.

Upon the evidence in this case it appears conclusively that this accident arose out of and in the course of employment. The words "arising out of and in the course of the employment" appear to be sufficient to include something which occurs while the workman is in his master's employment and on his master's work, even though he might be doing something in the interest of his master beyond the scope of what he was employed to do. The Act does not say "when doing the work he was employed to perform," and it is a fair inference that if it had been intended to limit the right to compensation to such accidents, different language would have been used from that which occurs in the Act. It must be assumed, therefore, that the Legislature used language of wider scope to include cases where a workman intervenes to do something useful or helpful to his master, although outside the special duties which he is employed to perform.

The evidence in this case shows that the employee was doing the identical work which he was employed to do, but even if the operation of this machine had been outside of his duties, it was done for the benefit of the employer, with his knowledge and acquiescence, and would, therefore, be compensable.

Award

It is ordered that an award issue providing for the payment of compensation to the plaintiff at the rate of $7.00 per week for a period of four weeks, for temporary total disability during which time he was under the doctor's treatment; and for the payment of compensation at the rate of $7.00 per week for a period of 200 weeks, for specific loss of the left arm; plus all medical and hospital treatment.

[Docket No. 376]

JAMES PARKER CLOUSE, Employee, Plaintiff, v. BULEN BRYSON, Employer (non-insured), Defendant

Filed May 17, 1930

Independent Contractor.—One injured in an employment by an independent contractor employing less than five employees and neither have elected to accept the act, the person for whom the work is being done is not liable for compensation.

This claim was heard before Allen, Chairman, North Carolina Industrial Commission, at Hendersonville, on April 23, 1930, office Clerk Superior Court.

Plaintiff and Defendant appeared in person.

Opinion by Allen, Commissioner.

Statement of the Case

The claimant in this case was employed by the defendant, Bulen Bryson. The evidence shows that the defendant, Bulen Bryson, entered into a contract with the firm of Rickman & Patterson for the logging of pulp wood and the cutting of the logs to a specified size for the flume; that Bulen Bryson employed four men, one of whom was the plaintiff, who were engaged in the logging operations; that Bulen Bryson contracted the yard work, for the cutting of the logs to the proper size for the flume, to his brother, at $2.25 per cord; that he retained no supervision over the activities or operations of his brother, other than to see that the logs were cut to the specified size; that his brother employed three men for the operation of the yard work, none of whom were paid or controlled by the defendant, Bulen Bryson; that the claimant was injured by striking his leg with an axe while engaged in working for Bulen Bryson in the logging in the woods, and was incapacitated for a period of twenty days.

Findings of Fact

Upon the evidence offered, the Commissioner finds as a fact:

1. That the defendant, Bulen Bryson, had in his employ only four men, and was, therefore not subject to the Workmen's Compensation Act.
2. That the contract between Bulen Bryson and his brother was an independent contract, and that Bulen Bryson retained no supervision or control over the operation, or as to the number of employees, or as to the wages paid the employees, of his brother.

Award

It is, therefore, ordered that this claim be, and the same is hereby, dismissed.

[Docket No. 467]

MRS. R. F. BURRIS, Employee, Plaintiff, v. SOUTHERN MANUFACTURING COMPANY, Employer, and U. S. CASUALTY COMPANY, Carrier, Defendants

Filed May 17, 1930

Dislocation of Spine.—Where evidence does not by its greater weight sustain claim of injury to spine from fall off the premises of the employer at a place where duty did not require claimant to be, case will be dismissed.

This claim was heard before Allen, Chairman, North Carolina Industrial Commission, at Lenoir, on April 25, 1930, at the office of the Clerk of the Superior Court.

The plaintiff was represented by *Mr. Louie A. Whitener*, Attorney, Hickory, N. C.

The defendants were represented by *Ralph A. Kidd*, Attorney, Charlotte, N. C.

Opinion by Allen, Chairman.

This was a claim from Caldwell County, N. C., for alleged injuries to the spine of the claimant, which she claims resulted from a fall on the railroad tracks near the Southern Manufacturing Company, at which place she was employed.

Statement of the Case

The plaintiff claims that on the night of the 26th day of September, 1929, she left the cotton mill, in company with several other employees, to walk across the railroad tracks to the Baptist Church, for the purpose of securing a drink of water, and that on her return trip she slipped and fell on the railroad track, injuring her spine and hips. She testified that her reason for leaving the mill to secure drinking water was on account of bad conditions of the toilet at the plant. It appears that she continued to work from September 26, 1929, until October 12, 1929, and that no report was made of the accident to any of the officials of the company until January 2, 1930, at which time a letter from Mr. L. A. Whitener was received in the mail by the Industrial Commission.

The plaintiff offered Dr. G. W. Rader, a chiropracter, specializing in spinal treatment, who testified that he was also a doctor of medicine, and had practiced medicine for eighteen years; that he examined plaintiff for the first time on the 31st day of December, 1929, and had since given her twenty-five treatments, for which he had submitted a bill of $50.00; that he made no X-ray of the spine; that upon examination he found two subluxations, or partial dislocations of the spine, which resulted in nervous disorders, which would continue for some time. (Dr. Rader exhibited a chart from which he described the particular injury to the claimant in the presence of the Court and the other physicians present.)

Dr. E. R. Russell testified that he had been treating claimant for nervousness and backache for some fifteen years, but had not seen the claimant since the alleged injury.

Dr. J. D. Rudisell testified that he treated the claimant in the hospital from December 11, 1929, to December 20, 1929, for rheumatism; that he took X-ray pictures of her spine on December 11, 1929, and found nothing wrong with the spine or back; that if there had been such a dislocation of the spine as indicated on the chart exhibited by Dr. Rader it would show in the X-ray pictures; that the X-ray pictures showed no dislocation and a perfectly normal spine.

Findings of Fact

Upon the foregoing evidence the Commissioner finds as a fact:

1. That the plaintiff has not sustained an injury resulting from an accident which arose out of and in the course of employment.

2. That if the plaintiff was injured in any manner whatsoever on the night of September 26, 1929, on the railroad tracks near the Southern Manufacturing Company, such injury is not chargeable to the defendant company, in that she was off the premises of the defendant without the knowledge, consent, or approval, of the defendant, and not in any emergency.

3. That the average weekly wage of the claimant, at the time of the alleged injury, was $15.00 per week.

Award

It is ordered that an award issue denying compensation and dismissing this claim.

[Docket No. 464]

WILLIAM CRAWFORD, Employee, Plaintiff, v. LONG, SNIDER & CODGILL, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed May 17, 1930

TO AND FROM WORK.—Where duties of employee required that he care for team, taking it to and from the place of work, an injury received while doing this is compensable.

This was a claim from Jackson County, N. C., for personal injuries resulting from the kick of a horse, heard before ALLEN, Chairman, North Carolina Industrial Commission, at Sylva, on April 19, 1930, at the office of the Clerk Superior Court.

Plaintiff represented by *C. C. Buchannon*, Attorney, Sylva, N. C.

Defendants represented by *Messrs. L. B. Carpenter* and *M. L. Page*, Maryland Casualty Company, Asheville, N. C.

Opinion by ALLEN, Chairman.

Statement of the Case

It apepars from the evidence that the claimant, and one F. W. Codgill, were employed by the defendant, Long, Snider & Codgill, to haul certain mill machinery from the railroad stations, Willets and Addie, to the lumber camp of the defendant, across the nearby mountain; that the contract of employment specifically included a two-horse team of the plaintiff, and a two-horse team of his co-employee, Cogdill; that the wages paid to the plaintiff and his co-employee, Cogdill, amounted to $6.00 per day each,—$3.00 per day each to be treated as wages for the man, and $3.00 per day for each team; that the claimant, and his co-employee Cogdill, were mountain farmers living near each other and in the vicinity of the defendant's lumber operation; that it was specifically understood that the claimant, and his co-employee, were to take the team home each night and return with the team each morning, and make one round trip to the lumber camp per day; that it was necessary for claimant and his co-employee Cogdill to perform this work together, due to the fact that one man could not load the machinery on the wagons; that the claimant and his co-employee Cogdill went to their work together each day with their teams; that on January 14, 1930, while the plaintiff and his co-employee, Cogdill, were proceeding over the mountain road from their homes to the railroad station, preparatory to making the usual haul across the mountain, Cogdill riding one horse and leading another, and the plaintiff doing likewise, the horse which was being led by Cogdill became entangled with some harness, causing the animal to become excited, and to back and kick, with the result that the horse which plaintiff was riding became excited and threw him within the range of the kicking horse, where he was struck on the leg, causing a fracture or break below the knee.

It further appears from the evidence that the claimant had not been regularly employed by the defendant, but had worked at intervals when there was hauling of this character to do.

It further appears from the evidence of one of the defendants that the labor of the claimant in that vicinity was worth from $3.00 to $3.25 per day.

It also appeared in the evidence that the defendants retained supervision and control over the work of the claimant and his co-employee.

The hearing was heard on the 19th day of April, 1930, and Dr. C. Z. Campbell testified that claimant was not able at that time to do regular work, and that in his opinion it would be sometime before his leg would be normal.

Findings of Fact

Upon the foregoing evidence the Commission finds as a fact:

1. That the plaintiff was in the employ of the defendant, Long, Snider & Cogdill, at the time of the accident and injury.
2. That the accident and injury arose out of and in the course of the employment.
3. That the average weekly wage of the plaintiff, at the time of the accident, was $18.00 per week.
4. That the plaintiff was totally incapacitated from performing manual labor beginning on January 14, 1930, and that such incapacity will continue for a period of 30 days after April 19, 1930.

Conclusions of Law

It is contended by the defendants that the claimant comes within the general rule, that an employee is not entitled to compensation for injuries received while going to or coming from his work, and that the risk of a horse kicking an employee on a country road, away from the place of employment, is not incidental to the employment.

It is difficult to conceive of any injury which arises out of the employment, which does not arise in the course of it, but the converse, however, is not true. The determination of this question presents one of the most difficult problems in connection with the Act. It has been said that every case must depend upon its own circumstances, and can not be solved by reference to any formula or general principle.

In the instant case the claimant, in order to fulfill his contract of service, not only was required to lead or ride the team over the mountain road each morning, but it was necessary that he have the assistance of his co-employee, Cogdill. They were neighbors, and it was but natural for the master to expect, under the circumstances, these two men to proceed to and from their homes to the railroad station together. If one reported for duty, and the other failed, the task assigned to them could not be fulfilled, because of the impossibility of the loading of this machinery by one man.

We, therefore, hold that the terms of the contract of employment, which provided for the carrying of the team from the railroad station to the homes of the claimant and his co-employee, and the return trip each morning, takes this case out of the general rule, and that the employment of the claimant began upon his leaving his home each morning, and ended when he returned to his home at night.

The risk of a kick by a horse under such circumstances was but an ordinary risk directly connected with the employment, and we hold that a risk is incidental to the employment when it belongs to or is connected with what a workman has to do in fulfilling his contract of service.

Award

It is ordered that an award issue providing for the payment of compensation to the plaintiff from January 14, 1930, to May 18, 1930, a period of 17 5/7 weeks, at the rate of $10.80 per week; together with all medical and hospital costs.

It is also ordered that Dr. C. Z. Campbell be, and he is hereby, allowed an expert fee of $10.00, which will be paid by the defendants.

[Docket No. 475]

J. P. GREEN, Employee, Plaintiff, v. BALFOUR MILLS, INC., Employer, LIBERTY MUTUAL INSURANCE COMPANY, Carrier, Defendants

Filed May 17, 1930

HERNIA.—Compensable injury includes one result of a strain proving more than the body could bear, not necessarily an unusual strain, but the unusual and unexpected injury resulting from a particular strain that constitutes the accident.

This claim was from Henderson County, N. C., for injury resulting in hernia, heard before ALLEN, Chairman, North Carolina Industrial Commission, at Hendersonville, on April 23, 1930, office Clerk Superior Court.

Plaintiff, J. P. Green, appeared in person.

Defendants represented by *J. B. Everett*, Claims Manager, Charlotte, N. C.

Opinion by ALLEN, Chairman.

It was admitted that the plaintiff, at the time of the alleged accident, was in the employ of the defendant company, Balfour Mills, Inc.; that the average weekly wage at the time of the alleged injury was $20.40 per week.

Statement of the Case

It appears from the evidence that the claimant, a man 64 years of age, was engaged at the time of the alleged injury as a carpenter; that on or about January 23, 1930, the claimant, after having repaired a doffing box for the spinning room, undertook to carry the doffing box from his workshop up a stairway to the spinning room; that the stairway was steep, and the steps 10¼ inches in height; that as he approached near the top of the stairway he felt a stinging pain in his left side, and that his side seemed to give way; that on the same evening he observed a protrusion about the size of a small hen egg; that on the following day the protrusion became larger and he knew that something was wrong; that on Sunday, the 26th, he consulted Dr. J. W. Payne; that within a short time after the consultation with Dr. Payne, Dr. Payne called him over the telephone for an examination, with the result that he secured a truss which he has been wearing since; that he reported the accident to the Superintendent of the mill on a Monday following the accident, which occurred on Thursday.

Dr. J. W. Payne testified that the claimant consulted him at his home shortly after the accident, and told him about the accident and how his side gave way; that later he received a report from the mill and phoned for the claimant to come to his office for an examination; that upon examination he found a hernia and recommended a truss, which the claimant promptly secured; that from the history given him by plaintiff the hernia seemed to date from the injury; that in his opinion a man 64 years of age, with lax muscles, would not be effected by pain as much as a younger man, unless there was a tearing of the tissues; that in his opinion a slight strain might have brought about the hernia.

Findings of Fact

Upon the foregoing, the Commissioner finds as a fact:

1. That the plaintiff sustained an injury resulting in hernia or rupture.
2. That the hernia or rupture appeared suddenly.
3. That it was accompanied by pain.
4. That the hernia or rupture immediately followed an accident.
5. That the hernia or rupture did not exist prior to the accident.

It appears from the evidence that the claimant has only lost eight days time from his work, and would, therefore, be entitled to only one day's compensation.

Conclusions of Law

In the case of *Wall v. Phillips Fertilizer Company*, filed January 29, 1930, the North Carolina Industrial Commission pointed out that in order to constitute a compensable injury under our statute it is not necessary that the accident be caused by unforseen and unexpected application of external force, but it may include a strain in which the employee has voluntarily subjected his body in the course of employment, and which has proved to be more than his body could bear. It is unnecessary that the strain to which the employee's body is so subjected be an unusual strain. It is the unusual and unexpected injury, resulting from a particular strain, that constitutes the accident.

In the present case it was argued that the doffing box only weighed about 16 or 20 pounds, and that the claimant was accustomed to manual labor which involved much more strain than the carrying of this box. The plaintiff does not contend that the weight of this box produced the hernia, but says that the carrying of the box up the steep stairway brought about the unexpected injury.

The North Carolina Supreme Court has defined "accident" to be "an event from an unknown cause, or an unusual and unexpected event from a known cause."

Regardless of the preëxisting condition of the abdominal wall, if the protrusion immediately follows an accident, and there was no preëxisting hernia or rupture, an actual hernia will be held by this Commission to result from the accident or strain.

Award

It is ordered that an award issue, providing that the defendant tender to the plaintiff an operation within thirty days from date, and upon failure so to do the plaintiff is authorized to procure such operation, the cost of which will be borne by the defendants; and that the defendants pay the plaintiff 60 per cent of his average weekly age for the time lost from employment on account of said operation as provided in Section 29 of the Act.

[Docket No. 405]

CALVIN EDGERTON, Employee, Plaintiff, v. LAKE LURE LUMBER COMPANY, Employer, and LUMBERMEN'S MUTUAL CASUALTY COMPANY, Carrier, Defendants

Filed May 17, 1930

TUMOR.—Where exploratory operation discloses tumor in the abdomen, and further operation disclosed intestines congested with some distension, the inflammation being foreign to the tumor, but resulting from nervous condition caused by muscle strain from excessive pressure of boards or planks on the nerves of the neck and shoulder, the disability resulting is compensable.

This was a claim from Rutherford County, N. C., heard before ALLEN, Chairman, North Carolina Industrial Commission, April 24, 1930, office Clerk Superior Court.

Plaintiff represented by *Wm. C. McRorie*, Attorney, Rutherfordton, N. C.
Defendants represented by *H. A. Green*, Adjuster, Greensboro, N. C.

Opinion by ALLEN, Chairman.

It was admitted that the plaintiff was in the employ of the defendant, Lake Lure Lumber Company, at the time of the alleged injury; and that the average weekly wage was $11.00 per week.

Statement of the Case

It appears from the evidence that on the 2d day of January, 1930, that the plaintiff was engaged to carry lumber from the planer to a point on the lumber yard where it was stacked; that while plaintiff was thus engaged, with several boards on his shoulder, he felt a sudden pain in his abdomen, like a pin scratch; that shortly thereafter he reported it to his co-laborers, and as soon as the foreman returned from dinner he reported the injury to him; that on the following morning he reported to Dr. Rucker, who sent him to the hospital; that he was kept under observation for three or four days, and then operated upon.

Dr. C. F. Glenn testified that he operated upon the plaintiff on the 11th day of January, 1930; that plaintiff gave him a history of carrying lumber for the defendant, and that while lifting the lumber to his shoulder he felt a slight pain in his left abdomen, which pain continued to grow worse; that he complained of being sick and having a constant pain over his abdomen; that he found a small mass in the left side, which seemed to be tender; that an exploratory operation was deemed to be advisable; that the first incision was made in the abdomen with the result that a mass was found under the subtegumental tissues attached to the muscles, which proved to be a small tumor, about one inch in the largest diameter, and three-quarters inch in the smallest diameter; that no evidence of hernia was found; that this wound was sewed up and another incision made on the left side, where it was found that the vessels of the intestines were very much congested with some distension; that the inflammation was entirely foreign to the tumor; and that the pain complained of by the plaintiff is accounted for through the nervous system; that there was no association between the tumor and the pains which the plaintiff complained of.

Dr. Glenn further testified as follows:

Examination by Mr. Green:

Q. Doctor, does it appear likely that his condition came from a strain?

A. According to his history it is suggestive of coming from a muscle strain, such as excessive pressure on the nerves around the neck and shoulder.

Q. That would be possible, but not probable?

A. Well, we have this man's history, and under the circumstances this man was rather consistent in his statements. He had this lumber on his shoulder, and it is possible that he could have had a pressure on the vertebra which would give him the sensation of pain. In this case we can have an association with the nervous systems.

Examination by Commissioner:

Q. With your knowledge of this man, his condition, the history he gave you, can you associate the condition you found with anything else other than this?

A. We found nothing that we could associate his condition with other than an injury.

Q. And I understand that it is your opinion that this tumor had nothing to do with his pains and incapacity at that time?

A. Nothing.

This accident was not reported to the Industrial Commission by the employer until February 12, 1930, seventeen days after the Commission had received notice from an Attorney representing the claimant. After the claimant was operated upon, and discharged from the hospital, there seems to have been no interest shown by the defendant as to the plaintiff's physical condition or his ability to return to work, and no examination was made by the defendants in an effort to assist the Commission in determining this question, and the Commission is, therefore, left with only the evidence of the plaintiff upon this question.

The hearing was conducted on April 24, 1930, and the claimant says that since the operation he has done no work for pay, and that he was unable to do heavy work of any kind until just a short time before the hearing.

Findings of Fact

Upon the foregoing, the Commissioner finds as a fact:

1. That the injury to the plaintiff resulted from an accident which arose out of and in the course of his employment.

2. That the claimant was totally incapacitated from performing manual labor from January 7, 1930, to April 1, 1930, or for a period of 82 days, or 11 5/7 weeks.

Award

It is thereupon ordered that an award issue providing for the payment of compensation to the plaintiff for a period of 11 5/7 weeks at the rate of $6.60 per week, plus medical and hospital bills.

It is further ordered that Dr. C. F. Glenn be, and he is hereby, allowed an expert fee of $10.00, which will be paid by the defendants, in addition to the compensation and medical treatment.

[Docket No. 377]

GEORGE W. OXENDINE, Plaintiff, v. ROCK CREEK JERSEY DAIRY, Employer, and AETNA LIFE INSURANCE COMPANY, Carrier, Defendants

Filed May 19, 1930

Farm Labor.—Where a farm laborer as part of his duties as such is required to do odd jobs of carpentry in repairing buildings incidental to farming, he does not lose his status as farm laborer, and injuries he sustains do not come within the Act.

Hearing before Dorsett, Commissioner, at Greensboro, N. C., April 30, 1930.

Plaintiff appearing in person.
Defendants appearing in person and not represented.

Opinion by Dorsett, Commissioner.

Statement of the Case

On October 18, 1929, the plaintiff, while employed by the defendant, a corporation, in the repair or extension of a barn on its premises, fell from the roof and received serious injuries to his ribs and a broken back. The defendants paid plaintiff $130.00 and paid medical and hospital bills totaling $71.50, and took a common law release from plaintiff against all claims and demands growing out of the accident.

Upon the evidence the Commissioner makes the following

Findings of Fact

1. That the defendant corporation was on October 18, 1929, engaged in dairy farming, making no deliveries of milk except to one person who bought the entire output delivered at the farm.

2. That the defendant as an incident to its farming business was on October 18, 1929, building an addition to and/or repairing one of its barns.

3. That the plaintiff was employed as a farm laborer on October 18, 1929, by the defendant and while so employed, and as incident to such employment, was engaged in assisting in repairing one of defendant's barns, he sustained injuries as a result of an accident that arose out of and in the course of his employment.

4. That the plaintiff's average weekly wage was $18.00.

5. That the employment of plaintiff was in agricultural service and plaintiff was a farm laborer at the time of the occurrence of the accident.

Upon the foregoing findings of fact are based the following

Conclusions of Law

Section 2 (a) defines employment as all private employments in which five or more employees are regularly employed in the same business or establishment, except agriculture and domestic service.

Section 14 (b) specifically exempts farm laborers from the operation of the Act. That the legislature intended exempting the operation of the Act, farm laborers engaged in agricultural pursuits, is clear, but at what dividing line the exemption terminates and the effects of the Act begin to operate, is our question herein.

If at the time of the occurrence of the accident, the plaintiff was engaged in tilling the soil, harvesting the crops, milking the cows or feeding the stock, there would be no difficulty in making the determination, although there are but few beacons to point out the way in cases of dairying, which is not the ordinary accepted meaning of agriculture and farm labor as an employment as described above. As an aid in arriving at the legislative meaning, we find that in C. S. Section 4688, subsection 10, the Commissioner of Agriculture is charged with the duty of promoting *Diversified farming* "including the rotation of crops, the raising of home supplies, vegetables, fruits, *stock*, grasses," etc.

One of the few cases reported wherein the question of Dairying is construed as farm labor is *Greischar v. St. Mary's College* (Minn.), 222 N.W., 525, in which it was said:

"Of course, no distinction can at this day be made in this state between the status of a laborer on a dairy farm and one on a grain farm, so far as the protection of the Workmen's Compensation Act applies. To milk cows and care for the barns on a dairy farm or plowing its fields, must be considered the work of a farm labor just the same as would be the same work upon any other sort of a farm."

Cases have arisen where "farm laborers" have performed work which was not tilling the soil or tending the live stock.

In the case of *Anderson v. Last Chance Ranch Co.* (Utah), 228, Pac., 184, we find:

"The authorities are uniform, as far as I am advised, in holding that the same employer can be engaged in two or more different kinds of business, trade, or occupation unconnected with one another, and all or some of them, nevertheless, be within the provisions of the Industrial Act.

"As a necessary corollary from what has been stated, the controlling question is, Was the defendant ranch company, in addition to its agricultural business also engaged as a business trade, or occupation in the contruction of buildings, or was the construction of the building in question merely incidental to its farming business, so much so as to be rightly considered a part thereof? If the former, we are of the opinion plaintiff comes within the Industrial Act, and is entitled to compensation; if the latter, he is excluded by the statute, and the order of the Commission should be affirmed."

In the case of *Benoy v. Torkelson* (Minn.), 201 N.W., 312, a carpenter was injured while engaged upon a potato warehouse erected by a farmer in which case it developed that the proportions of the warehouse being erected were too great for the storage of the crop of the farmer and was held to have been intended for use in buying and shipping potatoes as a commercial enterprise and the Court held that the employment was not incident to the farming operations.

The cases above are cited to distinguish cases that may arise under our Act, from the instant case wherein a farm laborer is, as an adjunct to his duties as such, required to do odd jobs of carpentry in repairing buildings incidental to farming.

For the reasons assigned, the claim for compensation is denied.

[Docket No. 606]

BEN BATES, Employee, Plaintiff, v. THE RALEIGH TIMES, Employer, and FIDELITY AND CASUALTY COMPANY, Carrier, Defendants

Filed May 23, 1930

BASEBALL PLAYER.—Where employer sponsors ball team, furnishes equipment, organizes same and supports it and injury results from playing the game, compensation is payable.

Hearing before WILSON, Commissioner, at Raleigh, N. C., May 21, 1930.

Plaintiff appeared in person.
Defendants represented by *L. S. Harris*, adjuster for the carrier.

Opinion by WILSON, Commissioner.

The evidence in this case tended to show that the plaintiff was regularly employed by *The Raleigh Times*, an afternoon newspaper, to insert comic sheets in the daily paper each Saturday; that during the past week he has been selling the noon edition of the paper on the streets; that he received seventy-five cents for his work each Saturday; that he began work about twelve o'clock noon and worked for about fifteen or twenty minutes, and would return in the afternoon at three o'clock to finish same; that during 1929 *The Raleigh Times*, in conjunction with *The News and Observer*, had organized a baseball team among the news boys; that during 1929 both teams were sponsored by their respective papers; that nobody but employees of *The Raleigh Times* was permitted to play on the team; that Robert McLaren, who was in charge of the street sales for *The Times*, had assisted in organizing a baseball team the first part of March, 1930; that no boys were permitted to play on the team except employees of the paper; that the members of the team believed the team was being sponsored and supported by *The Raleigh Times* this season as it was during the last season; that such as the bats, balls, mits and a glove or two were part of the equipment furnished by *The Times;* that the players did not have uniforms; that on May 29, 1930, these boys, including the plaintiff, had engaged in a ball game with a team purported to be *The News and Observer* team; that during this game the plaintiff was hit in the mouth with a ball, slightly cutting his upper lip, and necessitating his being removed from the field; that the plaintiff lost only one day's work, and the medical costs is six dollars.

Upon the evidence in this case the Commission makes the following

Findings of Fact

1. That both parties had accepted the provisions of the Compensation Act, and that the Fidelity and Casualty Company is the carrier.
2. That the plaintiff sustained an accidental injury March 29, 1929, while playing on the ball team organized among *The Raleigh Times* news boys and carriers; that the plaintiff lost only one day's work; that the medical cost totaled six dollars; that the accidental injury arose out of and in the course of the plaintiff's regular employment by *The Raleigh Times.*
3. That the ball team was organized among the news boys and carriers as a means in assisting to maintain the morale and spirit of the employees of said newspaper; that this ball team became incidental to the employment of the news boys and carriers, and specifically in the case of the plaintiff.

Award

The Commission awards the cost of necessary medical treatment, which amounted to six dollars to the plaintiff in this case.

The defendants will pay the costs.

[Docket No. 71]

WILL J. DYER, Employee, Plaintiff, v. CAROLINA WOOD PRODUCTS COMPANY, Employer, and THE TRAVELERS INSURANCE COMPANY, Carrier, Defendants

Filed May 22, 1930

FUMES.—Where lacquer does not contain poison in sufficient quantities to give off toxic fumes, evidence is not sufficient to sustain claim for compensation for illness alleged to be caused thereby.

Hearing before ALLEN, Chairman, at Asheville, N. C., on November 14, 1929.

Plaintiff represented by *Sanford W. Brown*, Attorney, Asheville, N. C.
Defendant represented by *A. C. Newsom*, Adjuster for the carrier.

Opinion by ALLEN, Chairman.

Statement of the Case

This was a claim from Buncombe County for injuries alleged to have resulted from poisoning from lacquer fumes.

It was admitted that the plaintiff was in the employ of the defendant at the time of the alleged injury, and that his average weekly wage was $19.63; that he was incapacitated from work from July 26, 1929, to September 23, 1929, and that his hospital and doctors' bills amounted to $86.

It appears from the evidence that the claimant had been in the employ of the defendant, Carolina Wood Products Company, for a period of about ten years; that he had been working in the particular room where the accident is alleged to have occurred for a period of two years; that the plaintiff and seven other employees were engaged in the finishing room where they operated machines that sprayed lacquer or varnish over the cabinets; that the windows of the finishing room were kept closed and the room ventilated by two suction fans; that on the morning of July 26 plaintiff reported for duty at seven o'clock, and at eight o'clock became nauseated with a pain in his abdomen; that he called for a doctor and was sent to the Mission Hospital where he remained for several days; that he returned to his work on September 23.

It further appears from the evidence that the plaintiff had been working in the finishing room of this defendant, in contact with lacquer fumes, for a period of ten years, during which period he had suffered no inconvenience or sickness other than an occasional headache.

Dr. W. P. Herbert testified that he examined the plaintiff after he had received treatment at the hospital, and that he diagnosed his trouble as poisoning from working in varnish and shellac.

At the conclusion of the testimony it was agreed by the plaintiff and defendant that samples of lacquer delivered to the Commissioner were identical products used by the defendant company at the time of the alleged injury, and that the Commissioner should have an analysis made by the State Chemist to determine if either of them contained poisonous substances in sufficient quantity to injure an employee by inhalation.

In pursuance of this agreement, the Commissioner delivered to the State Chemist the samples of lacquer, which were analyzed by Mr. W. A. Quenn, Assistant State Chemist, who testified before Commissioner Dorsett that he found no indication of benzol, but did find nitrobenzol and dinitrobenzol in small quantities, which were not sufficient to be toxic from the standpoint of fumes.

Upon consideration of all of the evidence the Commissioner finds that the plaintiff did not sustain an accident which arose out of and in the course of his employment. The burden of proof was upon the plaintiff to establish an accident with resulting injury, and the Commissioner is unable to find such upon this evidence.

It is true that Dr. Herbert gave as his opinion that the claimant was suffering from poisoning from working in shellac, but the chemist says that there was no poison in sufficient quantities to be toxic from the standpoint of fumes.

The ground fixed by the statute is injury by accident, and not the result of an indefinite something which may not be an accident. If there was poison in the fumes from this lacquer, the accidental and involutary inhalation by the plaintiff resulting in injury would not be occupational but an accident, but the plaintiff has failed to show the presence of any poison, thus leaving the cause of his sickness uncertain and unsettled.

It is ordered that an Award issue denying compensation, and dismissing this claim.

[Docket No. 144]

C. C. DALE, Employee, Plaintiff, v. OBSERVER PRINTING HOUSE, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed May 29, 1930

TOTAL DISABILITY.—Where injury totally disables printer from following his life's vocation but only consists of loss of use of the left hand, Section 31 only remedy and compensation payable only for loss of use of hand.

Hearing before WILSON, Commissioner, at Charlotte, N. C., April 14, 1930.

Plaintiff represented by *Wade H. Williams*, Attorney at Law, Charlotte, N. C.

Defendants represented by *L. E. Herrings*, Adjuster, Charlotte, N. C.

Opinion by WILSON, Commissioner.

Admissions

The agreement entered into on October 19, 1929, provided for compensation upon the wage of $37.50 per week, or $18.00 per week compensation. Compensation began on October 14, 1929. Plaintiff returned to work on November 25 and parties entered into an agreement for the payment of compensation for temporary partial disability. The records show that plaintiff has not been paid for the waiting period of the first seven days. Compensation paid for temporary partial disability from October 14, 1929, to January 6, 1930; temporary partial disability has been paid from January 6, 1930, to March 31, 1930, inclusive, at the rate of $11.25 per week. The present wage is $18.75 per week. Compensation has been discontinued. The nerves and leaders were cut in the left hand and the nerves and leaders cut in the little finger of the left hand. The medical bills have been paid.

Statement of the Case

Dr. E. R. Hipp testified that the plaintiff had 25 per cent to 30 per cent permanent partial disability of the left hand as the result of plaintiff's accidental injury on October 7, 1929; that the flexive tendons were cut in the wrist, thus affecting the entire hand. Dr. Hipp gave partial disability in the fingers as follows: 45 per cent in the fourth finger and 15 per cent to 20 per cent in the third finger and 10 per cent in the thumb. The per cent of permanent partial disability in the plaintiff's left hand being the only issue involved in this case. The Commission finds as a fact that the plaintiff has 30 per cent permanent partial disability in his left hand.

Conclusions of Law

Informally at the hearing, it was brought to the attention of the Industrial Commission that the injury to the plaintiff's left hand would incapacitate him for his life's vocation as a hand compositor in the composing room of a printing office. Section 30 of the Compensation Act reads as follows:

"*Except as otherwise provided in the next section hereafter*, where the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such disability, a weekly compensation equal to 60 per centum of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than eighteen dollars a week, and in no case shall the period covered by such compensation be greater than three hundred weeks from the date of injury. In case the partial disability begins after a period of total disability, the latter period shall be deducted from the maximum period herein allowed for partial disability."

Section 31 refers to specific injuries to members of the body and reads, in part, as follows:

"*In cases included by the following schedule*, the disability in each case shall be deemed to continue for the period specified, and the compensation so paid for such injury shall be specified there, to wit:

(a) For the loss of a thumb, sixty per centum of the average weekly wages during sixty weeks.

(d) For the loss of a third finger, sixty per centum of average weekly wages during twenty weeks.

(e) For the loss of a fourth finger, commonly called the little finger, sixty per centum of average weekly wages during fifteen weeks.

(m) For the loss of a hand, sixty per centum of the average weekly wages during one hundred and fifty weeks.

(t) Total loss of use of a member or loss of vision of an eye shall be considered as equivalent to the loss of such member or eye. The compensation for partial loss of or for partial loss of a member or for partial loss of vision of an eye shall be such proportion of the payments above provided for total loss as such partial loss bears to total loss."

The first clause in Section 30 "Except as otherwise provided in the next section hereafter" is conclusive and definite. Section 31 (m) provides one hundred and fifty weeks at sixty per cent of the average weekly wage with a maximum of $18.00 and a minimum of $7.00 per week.

According to the medical testimony in this case there was no injury to any part of the body other than the right and left wrist. There is no permanent injury to the right hand.

Until the Compensation Act is amended by Legislative action, the plaintiff has but one remedy and that is under Section 31 (m) and (t). The original injury was to the wrist and hand, therefore, the Commission takes the hand as the basis for an award.

Award

In addition to compensation previously paid the Commission awards compensation to the plaintiff for forty-five weeks at $18.00 per week for 30 per cent loss of use of the left hand.

All necessary medical and hospital costs are to be paid to the proper parties by the defendants as provided for in Section 25.

The defendants will pay the costs of this case.

[Docket No. 309]

MARVIN JOHNSON, Deceased, Employee, Plaintiff, v. CITY OF GASTONIA, Employer; COUNTY OF GASTON, Employer; LONDON GUARANTY AND ACCIDENT COMPANY, Carrier, and U. S. CASUALTY COMPANY, Carrier, Defendants

Filed May 31, 1930

GAS POISON.—Evidence does not support claimant's theory of death of deceased from gas poison while impersonating a prisoner in an employment as "stool pigeon."

This Hearing was held before Allen, Chairman, North Carolina Industrial Commission, at Gastonia, on March 7, 1930, office Clerk Superior Court.

Plaintiff represented by *G. T. Carswell,* Attorney, Charlotte, N. C., and *H. L. Taylor,* Attorney, Charlotte, N. C.

Defendants represented: City of Gastonia, by *A. E. Woltz,* Attorney, Gastonia, N. C.; *P. W. Garland,* Attorney for London Guaranty and Accident Company, Gastonia, N. C., and *Ralph V. Kidd,* Attorney, U. S. Casualty Company, Charlotte, N. C.

Opinion by Allen, Chairman.

This was a claim from Gaston County, on behalf of one Marvin Johnson, deceased, whose dependents claim that he came to his death through poisonous gas, received in the City Jail of Gastonia, N. C., while acting as a Detective in the employ of John G. Carpenter, Solicitor for the District, in an effort to secure evidence for the State, immediately following the death of Chief of Police, Aderholt.

Statement of the Case

The plaintiffs claim that the deceased was in the employ of the County of Gaston and the City of Gastonia, and while so employed was subjected to the inhalation of the poisonous gas which resulted in his death.

Upon the question of employment the following testimony was offered, namely:

John G. Carpenter, Solicitor, testified that he had charge of the prosecution of the defendants charged with the murder of Chief of Police, Aderholt; that one Jim Johnson approached him in June, 1929, and stated that the deceased might be of service to the State in the Aderholt case; that he directed Johnson to send the deceased to him, and that he would have the County pay a reasonable sum for his services; that he had discussed the matter with the Chairman of the Board of County Commissioners of Gaston County, and was told to use every effort to discover the truth; that the deceased presented himself at the City hall at Gastonia later, and he, Carpenter, ordered one of the officers to lock him up in the City Jail, and directed the officer to use him to find out the truth about the killing; that the deceased remained in jail a day or two, and returned to Charlotte without securing any information, and with the simple statement that he was "checking out"; that he received a bill for services from Attorney, G. T. Carswell, for $25.00, but failed to present it to the County Commissioners; that he had no conversation or understanding with the City of Gastonia, or with any of the city officials, with reference to the employment; that he had no understanding or agreement with the Board of Commissioners of the County of Gaston.

Ella Mullis, mother of the deceased, testified that her son left home on the last day of June, and returned on the 3d day of July, 1929; that he was in good health when he left home, but when he returned he complained of soreness, blindness, aching, and nervousness; that he told her that gas was thrown in the jail among the strikers, and that he was poisoned with gas; that she procured glasses for him through the Associated Charities;

that he had never had any trouble with his eyes or lungs before, and that his physical condition was perfect.

Upon cross-examination, Ella Mullis was unable to give any amount of support contributed to her by her son, and testified that her husband did not support her, and that although her son was in serious condition at her home between July 3 and October 7, she did not call a physician until October 6, and within twelve hours before his death. She further admitted upon cross-examination that she had been indicted and tried for selling whiskey and running a disorderly house.

The plaintiffs offered as witness, Bill Hampton, who was indicted for the killing of Chief of Police, Aderholt, who testified that the claimant was put in the cell next to him on the night of June 27, and that there was no gas loosed in the jail that night; that they took the claimant out on Sunday morning, and that during the period of time between June 27 and Sunday morning there was no gas loosed in the jail.

The plaintiffs also offered one Eula Carson, who testified that she was confined in the City Jail during the month of June, and that on or about the 13th of June she smelled gas, and heard something like a pistol go off and complained to the jailer, who said that he did not know anything about any gas being thrown in there.

On the other hand, the defendants offered evidence of the Chief of Police and City Manager, as to the quantity of Tear Gas owned by the City and the portion of it which had been used in an experimental manner, and both testified that this gas had been kept under lock and key, and only four portions of it used as an experiment at points far removed from the jail; that on the 12th or 13th of June a representative who visited Gastonia to sell the city this Tear Gas, closed all of the doors of the hall downstairs and let off some in the police bathroom to demonstrate it to the police, and that with this exception no gas had been used at the City Hall.

It also appears from the evidence that the Death Certificate of the deceased shows that the cause of his death was "acute myocarditis" contributed to by "acute alcoholism."

Findings of Fact

Upon the foregoing testimony the Commissioner finds the following facts:

1. That the deceased was not in the employ of the County of Gaston.

2. That the deceased as not in the employ of the City of Gastonia.

3. That the deceased was not injured by accident arising out of and in the course of any employment.

4. That John G. Carpenter, as Solicitor, had no power or authority to bind either the County of Gaston, or the City of Gastonia, in the employment of the deceased, or any other person, in the absence of express resolution by the governing Board.

5. That the average weekly wage of the deceased was less than $11.00.

6. That the death of the deceased as caused by acute myocarditis, which was contributed to by acute alcoholism.

7. That the dependents and personal representatives of the deceased failed and refused to report the alleged accident for a period of seven

months, and such failure has prejudiced, and will prejudice, the rights of the defendants.

Award

It is, thereupon, ordered that an award issue denying compensation, and dismissing this claim.

[Docket No. 296]

J. O. THOMPSON, Employee, Plaintiff, v. E. H. CLEMENT COMPANY, Employer, and U. S. CASUALTY COMPANY, Carrier, Defendants

Filed May 31, 1930

PARALYSIS.—Where injury results in paralysis, claimant entitled to compensation.

CONTEMPT.—Where physician refuses to give professional opinion claiming that it is private property, refusal subjects person to attachment for contempt of Court.

This hearing was heard before ALLEN, Chairman, North Carolina Industrial Commission, at the home of J. O. Thompson, plaintiff, at Efland, in Orange County, on March 3, 1930, by consent of parties plaintiff and defendant, and for the reason that claimant was paralyzed in his left leg and arm, and not in condition to be moved.

Plaintiff represented by *J. M. Sharp*, Attorney, Reidsville, N. C.
Defendant carrier represented by *Ralph Kidd*, Attorney, Charlotte, N. C.

Opinion by ALLEN, Chairman.

Admissions

It is admitted that the claimant was injured on October 19, 1929, and that on said date the claimant was in the employ of the E. H. Clement Company, one of the defendants; that on or about January 1, an agreement for compensation was entered into between the plaintiff and defendants, by the terms of which the plaintiff was paid for 2/7 weeks, at the rate of $16.50 per week. It is further admitted that the average weekly wages at the time of the alleged accident were $27.50 per week.

It further appears that on November 9, 1929, Physician's Certificate of Disability was filed by Dr. R. B. Hayes with the Industrial Commission in which it was stated that "the injured resumed part of his work on October 28, 1929"; that there was filed with the Industrial Commission on November 13, 1929, Attending Physician's Report, dated October 19, 1929, which report is made a part of the record herewith; that on February 5, 1930, the claimant requested that the claim be assigned for hearing and review, upon the grounds that there had been a change in conditions, and that he had lost the use of his arm and leg as a result of the accident and injury received on October 19, 1929.

Upon the foregoing admissions the Commissioner rules that there is but one question at issue, to wit: whether or not the present condition of claimant is the result of the accident and injury as of October 19, 1929.

J. O. THOMPSON, having been duly sworn, testified as follows:

Examination by Mr. Sharp:

Q. Mr. Thompson, what was the result of this accident you had?

A. Three days after I got the lick on the head, on the 19th of October, I just went dead down my side, and on February 12 I had a stroke on the side.

Q. Where were you first taken after this accident?

A. To Dr. Hayes.

Q. And who treated you first?

A. Dr. Hayes.

Q. How many times did Dr. Hayes see you?

A. I was took to him that evening, and went to see him the following Sunday and Monday.

Q. Who has treated you since that time?

A. Dr. Thompson.

Q. And you went back to work after this accident?

A. Yes sir, on Monday week after.

Q. What was your condition then?

A. The opposite side of my face was dead.

Q. Was the jaw bone broken?

A. It felt like it. It knocked out two of my teeth, and the crown came off of one.

Q. Has your speech been effected since the accident?

A. Yes sir, at times.

Q. At the time of the accident?

A. Not right then, it didn't.

Q. How long after?

A. A day or two before I noticed it.

Q. Have you any use of your arm now?

A. No sir.

Q. How about your leg?

A. Can use it just a little.

Q. Stand on it at all?

A. Just about a second or two, by holding on a post or something.

Q. You were knocked unconscious when the accident first happened?

A. Yes sir. They carried me about a hundred and fifty yards, and put me in a car and took me to Dr. Hayes' office.

Examination by Mr. Kidd:

Q. You were hurt on the 19th of October, 1929?

A. Yes sir.

Q. And went back to work on the 28th of October, 1929?

A. I believe so.

Q. How long did you work that time?

A. Till Saturday evening.

Q. Work in November?

A. Yes sir.

Q. In December?

A. Just lost one week.

Q. When did you have this stroke?

A. The 12th day of January, 1930.

Q. And when did you quit working before that stroke?

A. On the Saturday before, the stroke came on Sunday.

Q. How many strokes have you had?

A. The one.

Q. How many accidents have you ever had?

A. The one on October 19.

Q. Ever been treated by any doctor before this?

A. Yes sir, by Dr. Thompson.

Q. Didn't the company pay you for time lost on account of this accident?

A. I guess so.

Q. And you signed a release?

A. I signed something, they just brought some papers to me to sign, and I signed them; didn't know what they were.

Q. And you got a check for the money?

A. Yes sir.

Q. And you were working at the time you got this check?

A. Yes sir.

DR. J. M. THOMPSON, having been duly sworn, testified as follows:

Examination by Mr. Sharp:

Q. Dr. Thompson, describe just what you know about this man's troubles?

A. I think I saw him about four or five days after the accident, when he came to my office to see me. I did not bother about his jaw, but he told me about the lick he had received by the accident. He had an ankle sprained, and was complaining about a numbing sensation in the left side of his face. This was Wednesday or Thursday after the accident. He complained of this numbness and I told him that it would probably clear up. I saw him ten days later and he told me again about the numbness in his face. I believe I saw him once or twice before I was called when he had this stroke on a Sunday night.

Q. In your opinion, is that accident on October 19 the cause of the present condition of Mr. Thompson?

A. I could not say positively about that, because I have never treated him for anything but rheumatism, and don't know of his condition prior to this time.

Q. In your opinion could the paralysis come from this accident?

A. It is possible.

Q. Do you know whether he had one, two, or three strokes before the Sunday?

A. It did not seem to be an attack, but a loss of sensation. About five days after the accident I heard that he did not seem to have any grip in his hand.

Q. On the Sunday he was paralyzed do you know how it came on him?

A. Nothing, except when I came he complained about the numbness in his arm and left foot.

Examination by Mr. Kidd:

Q. You would not swear that this paralysis was caused by the accident?

A. No sir.

Q. Is it possible or probable that a man receiving an injury on October 19, that with such force as to cause a stroke of paralysis, would not that condition show up within a shorter time than three months?

A. It might set up slow.

Q. How many times did you see him up until January 12?

A. About three times.

Q. And he came to your office each time?

A. Yes sir.

Q. Do you believe that a man receiving a lick sufficient to produce paralysis would be able to do the kind of work he as doing up to January 11?

A. I don't know what kind of work he does.

Q. Did you take his blood pressure?

A. Yes sir, after the accident.

Q. What was it?

A. About two hundred.

Q. How old a man is Mr. Thompson?

A. Fifty-one or two.

Q. Did you examine his kidneys?

A. Yes sir, and there was no trace of albumen, and no hardening of the arteries.

Q. How long have you been his family physician?

A. About twenty years, but I only treated him for a little rheumatism.

Q. You said something about an injury to his ankle?

A. Yes, sir, he said he sprained it when he fell.

Q. You will not give us your positive opinion that this paralysis was caused by the accident?

A. No sir.

J. O. THOMPSON, recalled, testified as follows:

Examination by Mr. Sharp:

Q. On the Sunday, how many attacks did you have before you lost the use of your arm?

A. Twice, passed off the third time.

DR. J. M. THOMPSON, recalled, testified as follows:

Examination by Commissioner:

Q. Explain just how the lick on the right jaw, and on the right side of the head, behind the ear, would cause this paralysis on the left side?

A. Well, the nerves in the head cross, and the cells of the brain on the left side are on the opposite side in the head. The nerves of the brain cells cross in the head.

Q. Doctor, what is meant by mandible?

A. That is the lower jaw bone.

Q. Would this paralysis, if caused by this accident, be caused by a blood clot on the brain?

A. It could have been that.

Q. What else could have caused it?

A. A fracture could cause a hemorrhage. Anything that would interfere with the nerve tracts in the head might cause it.

Q. Would a fracture of the jaw cause sufficient pressure to produce this paralysis?

A. No sir, there would have to be interference with the nerves from the brain.

Q. How long, ordinarily, does it take a blood clot to form after an injury?

A. I could not tell you. If it was very small it might have a gradual leakage. Lots of times a small hemorrhage will cause a full paralysis.

Q. Do I understand that the time varies for formation of a blood clot?

A. Yes sir, sometimes they are slow, but I don't think it would go on for months, but it can be gradual.

Q. Have you an opinion as to whether or not this blow as described was such as to produce a hemorrhage with the resulting paralysis?

A. There was certainly enough violence to cause the hemorrhage.

Q. You said you took his blood pressure at about two hundred. Is there any reason for his blood pressure to be high since the stroke?

A. The two hundred was before the stroke. Since the stroke his blood pressure has come down to around one hundred forty. I have not taken it for two weeks or more.

Q. What do you say about blood pressure at two hundred at his age? Is that high?

A. It is higher than it should be, normal should be around one hundred fifty.

Q. Would a person at age fifty, with blood pressure at two hundred, be subject to a paralytic stroke?

A. From experience I see lots of them with much higher blood pressure who do not have a stroke.

Q. Does the blood pressure vary from time to time?

A. Yes sir, it depends upon the habits of the person, food eaten, elimination, etc.

Q. Do those things cause considerable variation?

A. I should think not.

Examination by Mr. Sharp:

Q. The lick on the head would have caused a blood clot, would it not?

A. A lick any place on the skull might have caused the hemorrhage. Any cranium pressure will cause high blood pressure.

Q. Is it not of record that persons have been injured and paralysis set in years later from that injury?

A. I could not say that it is.

Examination by Mr. Kidd:

Q. He had no evidence of a fractured skull, did he?

A. I did not look for anything like that.

DR. R. B. HAYES, having been duly sworn, testified as follows:

Examination by Mr. Sharp:

Q. Doctor Hayes, you remember about this accident?

A. Yes sir.

Q. What was the condition of this man?

A. Exactly as given in my report. You have that, don't you? He had an injury on the right side of his face over the jaw. In my opinion the bone was cracked. His ankle was sprained, and I believe he had a knot on his head.

Q. You dressed his wounds and sent him home?

A. Yes sir. He as unconscious when they brought him to my office.

Q. Was there much blood?

A. Yes sir, he bled considerably.

Q. Where was the blood coming from?

A. The jaw, but the skin was not broken above that.

Q. When did you see Mr. Thompson?

A. I saw him the day of the accident, the 20th, and the 27th. The next time I saw him he was at work at the Quarry.

Q. You have not examined him since then?

A. No sir.

Q. At the time did you make a sufficient examination, satisfactory to yourself, as to whether or not there would be any future results from the injury?

A. I reported that there would not be.

Examination by Mr. Kidd:

Q. You made a complete report of this accident right after it happened?

A. Yes sir.

Q. And in the report you said the injury would not cause any serious results?

A. Yes sir, unless the jaw became infected.

Q. You do not know the extent of the injury on the head. You could not tell whether there would be any internal injury that might cause a blood clot?

A. No sir, I could not tell at that time. I have no further opinion without further examining him.

Examination by Commissioner:

Q. Have you an opinion as to whether or not the blow he received on October 19 could have produced the paralytic stroke on January 12?

A. I have an opinion, but will not testify unless I get expert compensation.

Q. What is this opinion?

A. Do you qualify me as an expert?

Q. No sir, it is not up to me to qualify you. I can only pass upon your qualifications when I know them. I only know you are a practicing physician up to this time.

A. Then I decline to express an opinion.

Q. Doctor, I again ask you to answer the question and give me your opinion as to whether or not this claimant's present condition is the result of the accident and injury on October 19?

A. I decline to answer the question.

(NOTE BY THE COMMISSIONER: The Commissioner inquired of Dr. Hayes as to his opinion upon the question as to whether or not the blow received by the claimant on October 19 could have produced the paralysis on January 12 following. Dr. Hayes declines to answer the question, stating that he has an opinion, but refuses to give that opinion unless the Commissioner will qualify him as an expert witness, and provide for him proper fees as an expert witness. The Commissioner declines to comply with any such requirements at this stage, and reserves the right to pass upon the question of qualifications and fees later.)

Q. Doctor Hayes, I ask you again to answer the question, giving your opinion as to whether or not this man's condition is the result of the accident and injury on October 19?

A. I decline to answer the question.

Q. Doctor Hayes, I have no desire to do anything that would hurt or injure you in any way, and I hesitate to enter judgment here that will embarrass you, but I must insist that you render the proper respect to me as a Court and answer the question propounded. The question which has been asked you is the only question to be determined by the Industrial Commission at this hearing, and upon it depends whether or not this claimant will be awarded or denied compensation. I want to be entirely respectful and courteous to you, and I hope you will not let anything personal influence you in your decision to answer this question.

A. I still decline to answer the question.

(NOTE BY COMMISSIONER: Upon the foregoing, the Commissioner finds as a fact, and adjudges, that Dr. R. B. Hayes is in contempt of Court, and upon the foregoing refusal of Dr. Hayes to answer the question propounded by the Court, the Commissioner finds that such refusal by the doctor constitutes contempt of Court, and Dr. R. B. Hayes is hereby adjudged to be in contempt of Court.)

Q. Now, Dr. Hayes, I want to say to you that if there is anything personal which has entered into your refusal to answer this question, I hope you will put aside any personal feeling and consider me for the time being as a Court, and entitled to the respect due to a Court, and I call upon you again to answer the question propounded by the Court, and in this connection I want to say to you that this hearing was had in the bedroom, and at the bedside, of the claimant, who was your patient, because he was unable to attend Court, and because he is in such condition that he needs any compensation that may be due him, and that the question of compensation can not be decided until the question which has been propounded to you is answered, and passed upon by the Commission.

A. It is my understanding that a man's opinion is his personal property, and is to be paid for at his price. An expert must be paid expert fees. That is my understanding. You have the right to order me to examine the man and ask my opinion as an expert.

Q. Doctor, before entering any judgment I want to say to you that if you have any doubts about your rights, and desire to advise with counsel, there are two good layers present, one representing the plaintiff and the other the defendants, who will tell you what you should do under the circumstances.

A. When I seek expert advice I expect to pay for it, and I prefer to consult my own lawyer.

By Commissioner: Thereupon the Commissioner finds the following facts:

(1) That Dr. R. B. Hayes was the physician who first attended the claimant after his injury, and continued to treat him as his physician until he returned to work nine days thereafter.

(2) That Dr. R. B. Hayes was duly and regularly subpoenaed as a witness to attend the hearing at the residence of the claimant, J. O. Thompson, on Monday, March 3, at 3 p.m. That in response to said subpœna Dr. Hayes did appear in person, and was duly sworn as a witness on behalf of the plaintiff.

(3) That Dr. R. B. Hayes deliberately and defiantly refused to answer the question propounded by the Commissioner, as to whether or not the present condition of the claimant is the result of the accident and injury for which the said Dr. Hayes treated the claimant.

(4) That the said Dr. R. B. Hayes, by his refusal to answer the question propounded by the Commissioner, meant and intended to show his contempt for the Court.

It is Thereupon Ordered and Adjudged by the Commissioner, that Dr. R. B. Hayes be confined in the common jail of Orange County, North Carolina, for a period of ten days (10), or until such time as he shall decide to answer the questions propounded by the Court, execution to issue on the 5th day of March, 1930.

Thereupon, this hearing is continued until the Commission could have competent physicians visit the claimant and make an examination, after which an award will issue.

COMMITMENT

North Carolina—Orange County.
In the matter of Dr. R. B. Hayes,
For Contempt
Before, Matt H. Allen, Chairman
North Carolina Industrial Commission

State of North Carolina, to the Sheriff or Keeper of the common jail of Orange County—Greetings:

Whereas, on the 3d day of March, 1930, I did adjudge Dr. R. B. Hayes guilty of contempt of Court as appears in the attached copy of record, and did also adjudge that he be imprisoned in the common jail of Orange County for a term of ten days, beginning on Wednesday, March 5, 1930:

Now, therefore, you are commanded to arrest the said Dr. R. B. Hayes on March 5th, 1930, and deliver him to the keeper of the common jail of Orange County, North Carolina, and the keeper of said common jail of Orange County, North Carolina, is commanded to receive the said Dr. R. B. Hayes into said jail, and him to safely keep for the said term of ten days.

This, the 3d day of March, 1930.

(Signed) Matt H. Allen,
Chairman, North Carolina Industrial Commission.

[Docket No. 296]

J. O. THOMPSON, Employee, Plaintiff, v. E. H. CLEMENT COMPANY, Employer, and U. S. CASUALTY COMPANY, Carrier, Defendants

Hearing before the Full Commission

This was a Hearing before the Full North Carolina Industrial Commission, held in their offices at Raleigh, North Carolina, on May 19, 1930, at 10:30 a.m.; which was a continuation of the Hearing held at the home of the plaintiff, J. O. Thompson, at Efland, N. C., on March 3, 1930; the purpose of said hearing being to take the evidence of Dr. Hugh A. Thompson, of Raleigh, N. C., and Dr. W. C. Horton, of Raleigh, N. C., who had been directed by Matt H. Allen, Chairman, to make an examination of the plaintiff at his home in Efland, N. C., on May 8, 1930; and also the evidence of Dr. Blackwell Markham, of Durham, N. C., who had made an examination of the plaintiff for and in behalf of the defendants in this case.

Plaintiff represented by *J. M. Sharp*, Attorney, Reidsville, N. C.
Defendants represented by *Ralph V. Kidd*, Attorney, Charlotte, N. C.

Note: The Commission takes notice of the fact that the doctors are experts.

DR. HUGH A. THOMPSON, having been duly sworn, testified as follows:
Examination by Mr. Sharp:

Q. Your name, please, doctor?

A. Hugh A. Thompson, of Raleigh.

Q. Did you, at the instance of the Commission, see Mr. J. O. Thompson, the plaintiff in this case, and make an examination of him?

A. Yes sir.

Q. State to the Commission what you found in your examination?

A. I found that Mr. Thompson was suffering from paralysis of the left side of the body, effecting the arm and leg, also some slight paralysis of the face on the left side. There was no paralysis of the right side. His blood pressure was 200/125. His arteries did not show any evidence of hardening. His general health appeared to be good—no evidence of a diseased condition. There was a scar on the right side of the face, but I found no evidence of an injury to the skull. The scar was over the jaw bone. The teeth were in fair condition, but the crown was off one of his teeth, supposed to have been knocked off at the time of the accident. The blood was examined for syphilis, but was found negative.

Q. What history did he give you of the case?

A. The history was of having received a severe blow on the head by an iron pipe, and of having been knocked unconscious and carried to a doctor's office in Hillsboro. That occurred on October 19, 1929. A further history was that he was out of work for nine or ten days, and did part time work for five or six days following that, and then went back to his full duties. He suffered from severe headaches following the accident until January. He also said, and his wife said (Objection, overruled, exception) that he had some impediment in his speech. However, he was able to continue with his work up until January 12. On January 12, in the afternoon, he took a walk, and while he was out he had a stroke, which was immediately followed by two more strokes in the same afternoon, and following that he was completely paralyzed.

Examination by Mr. Kidd:

Q. Did you find, from your examination, evidence of high blood pressure, or anything else that would have produced this stroke, which he might have had before the injury?

A. I never saw him before the other day.

Q. From your examination, doctor, do you have an opinion satisfactory to yourself as to whether or not this condition would have been caused by this lick or blow on the head?

A. It could have been caused—do you mean whether or not the blow could have caused it apart from any preëxisting disease or condition?

Q. Yes sir?

A. Yes sir, that was my report.

Q. Could that blow have caused paralysis?

A. Well, the opinion I have is that the man had some preëxisting disease. I believe he had a severe brain injury which would have been a factor in causing the paralysis. I don't think the blow would have caused it independent of that.

Q. Doctor, where was he hit?

A. On the head.

Q. How do you know?

A. Well, that is the report, or the history of the case. I only saw the scar on the jaw, which was about midway between the chin and the ear.

Q. Would a lick on the jaw have caused a brain injury?

A. I don't know whether it would cause it or not. He must have received a severe blow, as the history was that he was knocked unconscious.

Q. Did you talk to his family physician?

A. No sir.

Q. Did you interview the doctor who treated him immediately after the injury?

A. No sir.

Q. Have you an opinion as to whether this blow could have caused the paralysis?

A. It could have been a factor.

Q. Did you examine his blood pressure?

A. Yes sir, 200/125.

Q. That is high?

A. Yes sir.

Q. How long does it take for one's blood pressure to get that high?

A. It will take longer in some cases than in others.

Q. How old was this man?

A. Fifty some.

Q. How long would it have taken for his blood pressure to get this high without this blow on the head?

A. I don't know.

Q. Is it not a gradual process—this high blood pressure?

A. Sometimes it is.

Q. What about the kidneys?

A. There was some granular casts, but I don't think there was anything other than a man of his age would have.

Q. Is it probable that a man receiving such an injury on October 19—wouldn't such a condition as he is in show up sooner than this?

A. It might show up soon, and it might not.

Q. You found no evidence of a fractured skull?

A. No sir.

Q. And he gave no history of concussion of the brain?

A. He gave a history of being unconscious for thirty minutes, and I believe that was the least thing that it could have been.

Q. You took a Wassermann Test?

A. Yes sir, negative.

Examination by Commissioner Wilson:

Q. Doctor, you said this blow was possibly the cause of this paralysis?

A. Yes sir.

Q. Would you say it was the probable cause?

A. I think it was a factor in this case.

Q. But I am getting at the difference between possible and probable?

A. Yes sir, but I think the blow would have been a factor.

Examination by Mr. Kidd:

Q. But you would not swear that it was caused by the accident?

A. No sir.

DR. BLACKWELL MARKHAM, having been duly sworn, testified as follows:

Examination by Mr. Kidd:

Q. Doctor, did you make an examination of Mr. J. O. Thompson?

A. Yes sir.

Q. Have you got the date of this?

A. Yes sir, May 8, 1930.

Q. Is this your report? (indicating).

A. Yes sir.

Q. Read it to the Court, please.

REPORT

"Face. Irregular scar about size of nickel in skin of right cheek near angle of the jaw. No bony deformity or mandible. Partial paralysis of facial muscles of left side of face.

"Neck, negative.

"Chest, lungs. Percussion note resonant throughout. Breath sounds vesicular in character. No rales. Expansion normal.

"Heart. Apex beat inside nipple line. Left border dullness in nipple line. Right border dullness beneath sternal margin. Sounds regular and of good quality. No murmurs, no thrills.

"Pulse. Regular, of good volume and tension. Peripheral vessels negative.

"Blood pressure, 205 systolic, 110 diastolic.

"Abdomen. Obese, no spasms, masses nor tenderness.

"Extremities. Paralysis of left arm and leg, with slight swelling of both members. Right arm and leg negative.

"Blood. Wassermann reported negative by State Department of Hygiene.

"Impression: Diagnosis, Hypertension, left hemiplegia.

"I think that the patient's paralytic condition is the result of high blood pressure which he has more than likely had for some time, even prior to his accident of October 9, 1929. It is possible that his accident may have been a predisposing cause of his apoplectic stroke, but in my opinion it is very *improbable* that such was the case."

Q. Then you would not swear that this paralytic stroke was caused by the accident?

A. It is very improbable.

Examination by Mr. Sharp:

Q. Were you present at the time of doctors Thompson and Horton?

A. Yes sir.

Q. And you all made the same examination?

A. Yes sir.

Q. And you say that it is possible that this accident may have been of a predisposing nature?

A. Yes sir.

Q. You did not find any evidence that would show a previous high blood pressure?

A. You do not always find it, even with hardening of the arteries.

Q. But it always accompanies it?

A. Not in all cases.

Q. You say this paralysis occurred 78 days after the blow received?

A. About that.

Q. Then it is your opinion that this blow that he was struck on the head, together with some preëxisting condition, could have brought about the condition?

A. Yes sir.

Examination by Commissioner Dorsett:

Q. What loss of use does he now suffer with the left arm and leg?

A. He has no control over them.

Q. Is that permanent?

A. Yes sir.

Q. Has he the loss of use of any other member?

A. No sir.

Q. And that is all that is wrong with him?

A. Yes sir.

DR. W. C. HORTON, having been duly sworn, testified as follows:

Examination by Mr. Sharp:

Q. Doctor, did you on May 8, together with Dr. Thompson, go to Efland and make an examination of Mr. J. O. Thompson?

A. Yes sir.

Q. State to the Commission just what you found, the history of the case, and your conclusions?

A. The history was that the man was struck on the head October 19. He was struck across the right side of the ear and upon the side of the head with some iron, or a pipe I believe. No, it was on the left side of the head. He was rendered unconscious from the lick for thirty minutes, carried a hundred and fifty yards to a car, and hauled three miles to a doctor's office. After his jaw was dressed he was carried back home. He was groggy for days after that, talked strange according to his wife, and did not act normal. He complained of headache, which ached most of the time. On January 12 he was stricken with paralysis, and this paralysis still exists. That was three months, lacking a week, after the injury. My conclusions are, that with a lick of such force, which must have been severe as it knocked him unconscious for thirty minutes, on the head, and with the history which we have no reason to doubt, of headaches, etc., that a paralysis following that in a man who has a normal blood, and there is no history of high blood pressure since the injury, except as recorded as 140 after eight or nine days rest, and a negative Wassermann, my conclusion is that the injury to the head either caused the paralysis, or contributed to it.

Examination by Mr. Kidd:

Q. Doctor, you made a thorough examination of Mr. Thompson?

A. Yes sir.

Q. You did not find any evidence of a fractured skull?

A. No sir.

Q. But you found a scar on the cheek.

A. Yes sir, a little above half way between the ear and the chin.

Q. Would a lick on the jaw there have produced a brain injury?

A. It would have to be a very severe lick there, to cause compression of the brain.

Q. If he had received a lick severe enough to have caused paralysis, would he have been able to return to work after nine days?

A. Yes sir.

Q. What was his blood pressure?

A. Two hundred.

Q. Doctor, was this paralysis caused by this accident?

A. I could not say positive.

Q. If the man had high blood pressure, paralysis could have been produced by that?

A. Yes sir, it may be looked for.

Q. Doctor, without any injury a man with blood pressure of two hundred would be looking for paralysis?

A. Oh yes, he could have been looking for it.

Findings of Fact and Award

Upon the foregoing evidence the Commissioner finds as a fact that the paralysis of the claimant on January 12, 1930, was the result of the accident on October 19, 1929.

It is thereupon ordered that an award issue providing for the payment of compensation to the claimant at the rate of $16.50 per week, for a period not to exceed three hundred ninety-nine and five-sevenths weeks (399 5/7).

Contempt Proceedings

The Commissioner, without any apology, prints into this record the entire testimony, on account of the unfortunate incident in connection with the refusal of one of the doctors to testify, with the result that he was sentenced for contempt, which matter is now pending on appeal in the Supreme Court of North Carolina.

Upon the refusal of the doctor to testify, the Commissioner was confronted with three questions, namely:

First: Is the North Carolina Industrial Commission a Court?

Second: Has the Industrial Commission the power to attach for direct contempt?

Third: Did the refusal of the witness to testify constitute contempt?

Upon the first question, "Is the North Carolina Industrial Commission a Court?" the Commissioner refers to Sections Nos. 4, 8, 11, 57, 58, 59, 60, 61, 62, 63, 64, and 54, of the Act, from which it may be seen that—

(a) It has exclusive original jurisdiction with respect to claims for personal injuries to workmen arising out of the relation of employer and employee.

(b) It has exclusive original jurisdiction with respect to like claims in cases where the State is a party.

(c) It has jurisdiction over the person insofar as is necessary to a proper exercise of its powers in the determination of questions of fact, in that it may subpoena or summon witnesses and cause them to be sworn, and may command the production of books and records.

(d) Its proceedings are stenographically reported, which with the opinion of the Commission constitute the record of the case upon appeal.

(e) Its findings of fact are conclusive, and appeal lies only for errors of law "under the same terms and conditions as govern appeals in ordinary civil actions."

(f) It may hold sessions at any place in the State.

(g) The rights recognized by it in matters submitted in it for determination, and the remedies it seems are exclusive of all other rights and remedies either at common law or otherwise.

In support of these conclusions the following authorities are submitted:

State ex rel Brewen-Clark Syrup Co. v. Missouri Workmen's Compensation Act, et al., 8 S.W. Reports—2d—897.

Texas Employers Insurance Association v. Knouff, 297 S.W., 799.

Keller v. Texas Employers Ins. Association, 297 S.W., 1113.

Upon the second question, "Has the Industrial Commission the power to attach for direct contempt?" the following authorities are referred to:

"The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs, of the Courts, and consequently to the due administration of justice." *Ex parte McCown*, 139 N.C., 104; *Ex parte Terry*, 31-32 U.S., 410.

"The contumacious refusal of a witness to testify may so directly obstruct a court in the performance of its duty as to justify punishment for contempt." *Ex parte Hudgins*, 63 U.S., 656.

"By declining to answer a series of questions, calculated and intended to elicit information that seemed essential to the prosecution of the suit, and which was nevertheless within his own exclusive knowledge, and failing to assign a more substantial reason than that given for his refusal, the defendant made himself amenable, as for contempt, and liable to be attached and punished, and the judge not only had the power but it was his duty to maintain the authority of the court by compelling a compliance with its lawful orders. *Ex parte Fertilizer v. Taylor*, 112 N. C., 148.

Upon the third question, "Did the refusal of the witness to testify constitute contempt?" the North Carolina Supreme Court, in the case of *Snow v. Hawkes*, 183 N.C., 365, has said "Contempt of Court signifies not only a willful disregard or disobedience of the court's orders, but such conduct as tends to bring the authority of the court and the administration of the law into disrespect, or to defeat, impair, or prejudice the right of witnesses or parties to pending litigation."

Section 978, subsection 6, of the North Carolina Code, (1927) provides that: "The contumacious and unlawful refusal of any person to be sworn as a witness or, when so sworn, the like refusal to answer any legal and proper interrogatory, is punishable as for contempt."

In the case of *Dixon v. People*, 63 Ill. App. Ct., 585, the appellant was a physician brought into Court by ordinary process, to testify as a witness. The appellant knew nothing of the facts of the case, but he declined to answer a hypothetical question propounded, except upon the payment of a fee of $10. The Court ruled he was in contempt, and found that the fee was reasonable, thus presenting the one question as to whether or not the appellant could lawfully decline to give his professional opinion without reasonable compensation.

The Court said among other things:

"The statute has fixed the compensation to be paid all witnesses, and the law requires every person, without regard to his calling or engagements, to appear as a witness when duly subpoenaed and to accept as full compensation the statutory allowance, however inadequate it may be.

"The administration of justice in the adjustment of the contentions growing out of the business affairs or concerning mere private, personal, or property rights of its citizens, is one of the most important sovereign duties devolving upon the State. Upon the performance thereof depends the public peace and tranquillity, and the safety and security of the property, reputation, person, and family, of every private citizen. Every citizen is therefore deeply interested in the proper discharge of that duty. It can only be discharged through the medium of judicial tribunals. Without the power to compel witnesses to attend and disclose facts in their knowledge pertinent to these contentions, these tribunals are powerless and cannot perform their functions. No distinction can, we think, be drawn between different kinds of knowledge, nor can a witness decline to make known facts which have come to his knowledge, either by observation or study and experience, upon the ground he can use such facts or knowledge for his pecuniary benefit in the business affairs of life, when the disclosure thereof is important to the attainment of justice in the courts.

"No reason is perceived why compensation beyond that fixed by the general laws of this state should be allowed to this class, or to any one class of experts, unless it is allowed to every other class, of which there are many. Some works on expert testimony enumerate as many as seventy classes of expert witnesses.

"To hold that each member of these different classes of witnesses may lawfully demand that litigants shall arrange for the payment of reasonable compensation before he can be compelled to disclose in open court, facts in his knowledge relating to the right and justice of causes there pending for determination, would be impracticable, and would often operate to subject a litigant to financial burdens so great as to practically deny him a hearing in the courts; would tend to make the administration of the law depend upon the financial ability of the suitors to compensate witnesses in order to have the benefits of facts in their knowledge, and to bring such testimony into discredit, as having been purchased, and to attach scandals and grave suspicions to expert witnesses and expert testimony.

"Nor does the rule requiring experts to testify for legal fees, deprive the witness of his property for public use.

"Knowledge gained by study, observation, and experience, is not property within the meaning of the word as used in section thirteen, article two, of the Constitution, wherein it is provided that private property shall not be taken or damaged for public use without just compensation."

It was contended by the doctor that his professional opinion was his private property, for which he had the right to make any charge that he saw fit, and that the Courts had no jurisdiction over it.

While this may be true, in dealing privately with individuals, no such rights can be recognized when he is called into Court to aid in the administration of public justice. It must be apparent that if the Industrial Commission, or any other Court, were required to trade with doctors, and other persons who claim to be experts in their particular line, as to the price to be paid for their expert opinions, the administration of justice would be hampered and outlawed, and degenerated to a money consideration. Under such a condition what would happen to the claimant, who was without funds and unable to pay the doctor's price, in a contest with a corporation or insurance carrier who had unlimited funds.

In the opinion of this Commission such a position can not be defended, and we do not feel that the great and honorable medical profession of this State and country will give its approval to any such uncharitable and revolutionary position.

[Docket No. 365]

R. E. BURNS, Employee, Plaintiff, v. ROCKWELL CASKET COMPANY, Employer, and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Carrier, Defendants

Filed May 27, 1930

DISEASE.—Where disease results naturally and unavoidably from the accident, injured entitled to compensation.

Opinion by DORSETT, Commissioner.

Statement of the Case

The facts, briefly stated, in this case are as follows:

The plaintiff, on November 5, 1929, while driving an automobile, the property of the defendant, employer, on the State Highway near Walnut Cove, N. C., allowed the same to get away from him and run off the highway down an embankment several feet high.. As a result of the accident he sustained a cut one and one-half inches long on his forehead. He complained of a good deal of pain in his left shoulder and the right side of his neck and had some difficulty in turning his head. There were three or four cuts on his right leg between the knee and the ankle and a bruise on the inner side of the other leg. He received no medical attention until he reached home in Sedgefield, North Carolina, near Greensboro, on the night of the accident. Dr. Norman attended him from November 5 until November 13 when the plaintiff returned to work.

After returning to work it seems that the plaintiff had some kind of dizziness which attacked him in Fayetteville, N. C., about two days after starting on the road again and had to return home. On December 10 the plaintiff was admitted to the Moore-Herring Hospital at Wilson, N. C., following an attack in the Cherry Hotel located in that city.

Before the plaintiff returned to work after the accident he was over to see his doctor and the doctor told him that he thought it was safe and would be all right for him to go to work. The doctor says, however, that the plaintiff complained with his neck and shoulder but that was all; that his condition was good except that there was some stiffness about the muscles of the neck extending into his right shoulder and that there was some limitation of the right shoulder. Doctor Norman says that he found nothing at all wrong with the plaintiff's heart; that he did not take his blood pressure but that there seemed to be no reason for his not going back to work.

Dr. Pittman first attended the plaintiff following the attack at the Cherry Hotel in Wilson, N. C., on the night of December 10 between eleven and eleven-thirty o'clock. Dr. Pittman says that he found Mr. Burns in bed crying out with excruciating pain, putting his hands over his heart and chest; that he gave the plaintiff a shot of morphine and called an ambulance and sent him to the hospital. At the hospital his blood pressure was taken and could not be read—his sistolic pressure. His pulse was around 200 and so fast that it could not be counted. He was very syanotic. Doctor Pittman says that from the history he received from Mrs. Burns, wife of the plaintiff, that the attack came on the plaintiff while in bed. Doctors Pittman and Woodard spent most of the night with him. The morning following the plaintiff was unconscious. He stayed in a stupor for about forty-eight hours and Dr. Pittman says that when he came out of the stupor he showed signs of brain irritation and that it took four or five nurses and a couple of orderlies to keep him on the bed; that he would get off of the bed and talk foolishly and didn't know where he was and say things over and over. At that time his blood pressure had gone up. Forty-eight hours after that he had another sinking spell with irregular breathing, long breathing and then short breathing. It was decided to call in Dr. Burrus, the family physician, from High Point, N. C. Dr. Burrus made an examination and thought the plaintiff had a coronary thrombus—an occlusion of the blood vessels of the heart affecting the heart muscles. Dr. Burrus, on his leaving for High Point gave instructions to have an autopsy made to prove whether he had a brain hemorrhage or coronary thrombus and to see whether the accident had anything to do with it or not. All of the doctors at this time were sure that the plaintiff was going to die. It seems that about forty-eight hours later the plaintiff was still unconscious and three days after that he came to and from that time on his speech centers were affected. He blurred his words and ran everything together. Doctor Pittman says that he never did make a diagnosis but is of the opinion that he had an injury to the brain and a coronary thrombus also and that he does not think the heart condition had anything to do with his mental condition. Dr. Pittman says that he examined the plaintiff some thirty days after discharging him when the plaintiff was back in Wilson on business and that he went over him thoroughly and found his blood pressure normal and that the average physician would say that the heart was normal; that it was normal as far as he could tell and that it was normal as far as Doctors Norman and Burrus could tell. Dr. Pittman on cross-examination stated that it was his opinion and the opinion of every one that examined the man that the injury he received is in some way the cause of his disability and his attack suffered in Wilson.

Doctor Burrus, in his testimony, says that when he made his first examination of the plaintiff that he thought it was a coronary thrombus—an occlusion—and that it looked to him like the man was going to die probably within twelve to twenty-four hours; that clinically he found a textbook picture of a coronary occlusion. Dr. Burrus testified that he had known the plaintiff for a long time and that from time to time he had occasion to examine the plaintiff; that he last examined him about a year ago. The doctor was asked if he had an opinion as to whether or not there was any causal connection or relation between the condition suffered by the plaintiff in Wilson, North Carolina, and the accident on November 5, 1929, and answered that he did. The doctor's words are:

"Here is a man that was perfectly normal up to a certain time. Then he receives a certain injury, say to his chest, or even to a limb, and the capillaries could have picked it up and carried it over."

Q. From your history and examination, would you say that this man is suffering from natural causes?

A. No, sir.

Q. Is it possible for a man to receive a brain injury or any other injury from trauma and that not show on the surface?

A. Oh yes.

Q. Did you ever find anything wrong with his heart when you examined him?

A. I never did.

Dr. F. R. Taylor has made a thorough examination and full report which is a part of the record in this case. Dr. Taylor says that there is no evidence of any congenital heart disease as far as he could tell; that he could find no trouble in the lungs; that there is no evidence of paralysis in the way he walks. Dr. Taylor made an electrocardiograph and stated that the same suggested the probability of his having had a coronary thrombus though a single record is not conclusive. Dr. Taylor says that it may be accepted that the plaintiff did have coronary thrombus and that he could not personally see how an injury could cause coronary thrombus but that he could see how the accident could cause a brain injury. Doctor Taylor says that he can not connect his heart condition with his injury but that he can connect his brain injury and the impediment to his speech with it. Dr. Taylor agrees with Dr. Pittman that the plaintiff in Wilson was suffering from both coronary thrombus and a brain injury. Just before leaving the stand he again says that in his opinion the plaintiff had two conditions; that his mental condition might have caused him to have the second accident in Fayetteville.

Upon all of the evidence the Commission makes the following

Findings of Fact

1. That the plaintiff and defendants elected to accept the Workmen's Compensation Act and are bound thereby, and that the American Mutual Liability Insurance Company is the carrier.

2. That on November 5, 1929, while in the employ of the defendant Casket Company, the plaintiff sustained an injury by accident that arose out of and in the course of his employment.

3. That the plaintiff was totally disabled for a period of ninety days as a result of the accident on November 5, 1929.

4. That the plaintiff's average weekly wage was in excess of $30.00.

5. That the plaintiff completely recovered from the results of the accident after a period of ninety days from the date of same.

6. That the plaintiff was disabled for ten days following the accident on November 5, 1929, and on December 10, 1929, sustained a recurrence of disability which disabled him for eighty days. It is true that the plaintiff was suffering from a disease while in Wilson on December 10, 1929, but Section 2 of the Act recognizes that compensation is payable where an accident results necessarily and unavoidably in a disease. Com-

missioner Wilson in *Williams v. Thompson*, 1 N.C. I.C., 127, has thoroughly discussed the questions of diseases arising from accident and the authorities therein quoted sustain the Commissioner's conclusions herein.

Upon the foregoing findings of fact it is directed that there issue the following award.

Award

That the defendant pay to the plaintiff compensation at the rate of $18.00 per week for a period of ninety days from November 5, 1929; that the defendants pay to the proper persons all medical and hospital bills incurred, the said bills to be first submitted to the Industrial Commission for approval.

Concerning the costs in this case, each side will pay its own.

Following cases heard and determined, but are valueless as precedents and not published in advance sheets:

Erwin Millsaps v. Patton Pickett Pole and Timber Company and Great National Insurance Company, Docket No. 358.

Cecil Rice v. Patton Pickett Pole and Timber Company and Great National Insurance Company, Docket No. 359.

F. E. Crisp v. Patton Pickett Pole and Timber Company and Great National Insurance Company, Docket No. 360.

Mrs. Annie Watkins v. Osceola Mills, Inc., and Maryland Casualty Company, Docket No. 361.

Fred Phillips v. Phoenix Utility Company and Liberty Mutual Insurance Company, Docket No. 362.

J. H. Clark v. Parker-Graham-Sexton, Inc., and The Travelers Insurance Company, Docket No. 363.

F. D. Kruger v. Ford Motor Company, Self-insurer, Docket No. 364.

C. A. Carver v. Carolina Wood Products and Travelers Insurance Company, Docket No. 365.

S. C. Harrell v. Enterprise Lumber Company and Great National Insurance Company, Docket No. 366.

W. T. Phifer v. Foremont Dairy, Inc., and Indemnity Insurance Company, Docket No. 369.

J. B. Lyon v. Allen Milling Company and American Mutual Liability Insurance Company, Docket No. 370.

W. B. Cook v. Mooresville Cotton Mills and Maryland Casualty Company, Docket No. 371.

James Underwood v. D. S. Hildebrand and U. S. Casualty Company, Docket No. 372.

Claude Victor Brown v. D. S. Hildebrand and U. S. Casualty Company, Docket No. 373.

James Hester v. J. N. Bryand & Son and Commercial Casualty Company, Docket No. 374.

J. T. Gates v. Phoenix Utility Company and Liberty Mutual Insurance Company, Docket No. 375.

Roy E. Garrison v. Ford Motor Company, Self-insurer, Docket No. 377.

R. J. Carter v. Goodwin-Smith Furniture Company and Commercial Casualty Company, Docket No. 379.

Ruby Brooks v. American Yarn Processing Company and American Mutual Liability Insurance Company, Docket No. 380.

Sam Norris v. J. F. Rogers and Maryland Casualty Company, Docket No. 381.

S. Earl Huffman v. Hickory Chair Company and U. S. Casualty Company, Docket No. 382.

Joe Wild v. Rex Spinning Company and Globe Indemnity Company, Docket No. 383.

J. C. Bigham v. Model Steam Laundry and Travelers Insurance Company, Docket No. 384.

W. A. McCarn v. Arazon Cotton Mills, Self-insurer, Docket No. 385.

George T. Poston v. Sheraton Hotel and U. S. Casualty Company, Docket No. 386.

J. C. Ellis v. Beacon Manufacturing Company and American Mutual Liability Insurance Company, Docket No. 387.

Robert P. Clark v. Pilot Life Insurance Company and Fidelity and Casualty Company, Docket No. 388.

Curtis Gordon v. Thomasville Chair Company and Liberty Mutual Insurance Company, Docket No. 389.

Mrs. Maude H. Thompson v. County Board of Education Gaston County and Globe Indemnity Company, Docket No. 390.

Josh Duncan v. Manville-Jenckes Company and Union Indemnity Company, Docket No. 391.

S. Robert McPherson v. Phoenix Mills Company and The Travelers Insurance Company, Docket No. 392.

Gus Bennett v. Bonnis Cotton Mills, Inc., and American Mutual Liability Insurance Company, Docket No. 393.

J. L. Harris v. Fairbands Moras Company and Globe Indemnity Company, Docket No. 394.

Jim Cody v. Wenonah Cotton Mills Company and Maryland Casualty Company, Docket No. 395.

Mrs. D. H. Bowles v. Bluebell Overall Company and General Accident Fire and Life, Docket No. 396.

Canty Lawson v. American Tobacco Company, Self-insurer, Docket No. 398.

Grover M. Rummage v. Thomasville Chair Company and Liberty Mutual Insurance Company, Docket No. 399.

Charlie Robinson v. G. W. Crouse and W. F. Rose Company and Maryland Casualty Company, Docket No. 400.

T. B. Shaw v. Roaring River Furniture Company and American Mutual Liability Insurance Company, Docket No. 404.

Mrs. R. F. Burrus v. Southern Manufacturing Company and U. S. Casualty Company, Docket No. 405.

M. M. Hawkins v. Ozark Mills, Inc., and London Guarantee and Accident Company, Docket No. 535.

Luther Broadwell v. American Tobacco Company, Self-insurer, Docket No. 410.

Jasper Harvell v. Knox Furniture and Manufacturing Company and Employers Liability Assurance Corporation, Docket No. 411.

T. M. Downey v. Wm. Muirhead Construction Company and Maryland Casualty Company, Docket No. 412.

E. C. Bruton v. Dabbs Paint and Duco Company and New Amsterdam Casualty Company, Docket No. 413.

John Bumpus v. J. J. McDevitt Company and Maryland Casualty Company, Docket No. 414.

D. L. Rust v. Burke County Road Commission and Travelers Insurance Company, Docket No. 415.

S. M. Hilliard v. Carolina Steel and Iron Company and Maryland Casualty Company, Docket No. 416.

Douglas Baker v. Wake Forest College and Century Indemnity Company, Docket No. 417.

B. J. Mays v. Mount Airy Furniture Company and American Mutual Liability Insurance Company, Docket No. 418.

Howard Kirkman v. Spray Cotton Mills and American Mutual Liability Insurance Company, Docket No. 419.

J. M. Parker v. Leaksville Light and Power Company and Aetna Life Insurance Company, Docket No. 420.

James Arwood v. Charles Lewis Company and Employers Liability Insurance Corporation, Docket No. 421.

S. D. Carrard v. Duke Construction Company and Liberty Mutual Insurance Company, Docket No. 422.

Lenard Johnson v. Chatham County Board of Education and Employers Liability Assurance Corporation, Docket No. 423.

Master Walsh v. Foster & Allen and Maryland Casualty Company, Docket No. 425.

Lonnie Mathis v. George K. Hale Manufacturing Company and Indemnity Insurance Company of North Carolina, Docket No. 426.

Ruby Bumgarner v. Catawba Cotton Mills and Travelers Insurance Company, Docket No. 428.

Van McCurry v. Carolina Mineral Company and Globe Indemnity Company, Docket No. 429.

Chevis Herring v. W. A. Bordeaux and Employers Liability Assurance Corporation, Docket No. 430.

George T. Gasteene v. Town of Snow Hill and Fidelity and Casualty Company, Docket No. 431.

J. O. Horne v. Jennings Cotton Mill and American Mutual Liability Insurance Company, Docket No. 432.

Dewey Friddle v. Blue Bell Overall Company and General Accident Fire and Life Insurance Company, Docket No. 434.

A. B. Hamm v. Fiske Carter Construction Company and Maryland Casualty Company, Docket No. 435.

H. E. Pusey v. The Pullman Company, Self-insurer, Docket No. 436.

John Manning Rigsbee v. Durham Foundry and Machine Works and Liberty Mutual Insurance Company, Docket No. 437.

Tillman Collins v. North Carolina Granite Corporation, Self-insurer, Docket No. 438.

E. P. Paschal v. McPhail Greenhouses and Georgia Casualty Company, Docket No. 439.

Ben R. Lowe v. City of High Point and Hartford Accident and Indemnity Company, Docket No. 440.

Simon Whitaker v. Highway Commission of Halifax County and United States Fidelity and Guaranty Company, Docket No. 441.

Luther Perry Horne v. City of Fayetteville and American Casualty Company, Docket No. 442.

J. T. Pilley v. Greenville Cotton Mills and American Mutual Liability Insurance Company, Docket No. 443.

John Cross v. North Carolina Finishing Company and Aetna Life Insurance Company and Travelers Insurance Company, Docket No. 444.

Dave Dixon v. Harry E. Browder and Union Indemnity Company, Docket No. 445.

W. W. Barker v. Atlantic Gulf and Pacific Company and Indemnity Insurance Company of North America, Docket No. 446.

H. W. Wiggins v. State Highway Commission, Self-insurer, Docket No. 447.

Miss Anne Lucille Walker v. Nawil Store and Travelers Insurance Company, Docket No. 448.

Mrs. Laura Roberson v. Steele Cotton Mills Company and American Mutual Liability Insurance Company, Docket No. 449.

D. I. Roberts v. City Ice and Fuel Company and Northwestern Casualty and Surety Company, Docket No. 450.

Zara Butler v. Acme Manufacturing Company and Indemnity Insurance Company, Docket No. 451.

R. Glenn Ashburn v. Surry Sales Company and United States Fidelity and Guaranty Company, Docket No. 452.

Nello I. Tear v. E. W. Grady and American Mutual Liability Insurance Company, Docket No. 453.

Floyd Wiggins v. Atlas Plywood Company and Travelers Insurance Company, Docket No. 454.

Archie Thompson v. Imperial Tobacco Company and Travelers Insurance Company, Docket No. 455.

Lyda Hyder v. Carolina Wood Products Company and Travelers Insurance Company, Docket No. 458.

D. I. Thompson v. Roanoke Railroad and Lumber Company, Self-insurer, Docket No. 459.

J. O. Thompson v. N. E. Clement and U. S. Casualty Company, Docket No. 460.

B. E. Burns v. Rockwell Casket Company and American Mutual Liability Insurance Company, Docket No. 461.

Louis Payton v. Brewer Paint and Wall Paper Company and American Casualty Company, Docket No. 462.

B. F. Allen v. Hannah Pickett Mills, Inc., and United States Casualty Company, Docket No. 463.

O. L. Sherman v. R. R. Stone and/or Stone's Marine and Maryland Casualty Company, Docket No. 464.

SUPREME COURT DECISION

WADE O. CONRAD v. COOK-LEWIS FOUNDRY COMPANY, et al.; North Carolina Supreme Court, No. 409

Filed May 13, 1930

Appeal from Guilford County.

King, Sapp & King for appellant; *Walser & Walser* for appellee.

Adams, J.—The claimant and a colored man named Dolly Squires were employees of the Cook-Lewis Foundry Company—the plaintiff a moulder and Squires a helper. They engaged in a conversation pertaining to their work and Squires addressed to the claimant language deemed by the latter to be insulting. The claimant then struck Squires with a shovel. Squires left the shop, went to the employer's office, and received his wages. About half an hour later he went back to the shop, put the barrel of a shotgun through a hole in the wall, and shot the plaintiff in the back, thereby inflicting serious and permanent injury.

The workman's compensation law prescribes conditions under which an employee may receive compensation for personal injury. Section 2 (f) declares that "injury and personal injury shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except when it results naturally and unavoidably from accident." The condition antecedent to compensation is the occurrence of an (1) injury by accident (2) arising out of and (3) in the course of the employment.

Was the injury suffered by the claimant an injury by accident? In construing the word "accident" as used in the compensation act we must remember that we are not administering the law of negligence. Under that law an employee can recover damages only when the injury is attributable to the employer's want of due care; but the act under consideration contains elements of a mutual concession between the employer and the employee by which the question of negligence is eliminated. "Both had suffered under the old system, the employer by heavy judgments . . . , the employee through old defenses or exhaustion in wasteful litigation. Both wanted peace. The master in exchange for limited liability was willing to pay on some claims in the future where in the past there had been no liability at all. The servant was willing not only to give up trial by jury but to accept far less than he had often won in court, provided he was sure to get the small sum without having to fight for it." *Stertz v. Industrial Ins. Commission*, 91 Wash. 588, 158 Pac. 256.

The result was that the compensation law discarded the theory of fault as the basis of liability and conferred an absolute right of compensation on every employe who is injured by an "accident arising out of and in the course of the employment." *Smith v. Light Co.*, 198 N. C., 614. The word "accident," as used here, has been defined as an unlooked for and untoward event which is not expected or designed by the person who suffers the injury. Annotation—Workmen's Compensation, L.R.A., 1916A, 227; *Furst Kerber Cut Stone Co. v. Mays*, 144 N. E. (Ind.) 857.

In *Garrett v. Gadsden Cooperage Co.*, 96 So. (Ala.) 188, it is said that the courts, looking at the matter from the workman's viewpoint and construing the legislative intent as being, on economic grounds, to provide compensation for employees against personal injury not expected or designed by them, have adopted a meaning deemed necessary to give effect to the broad legislative purpose.

Accordingly, while the decisions are not uniform, it is generally held that the mere fact that an injury is the result of the willful or criminal assault of a third person does not prevent the injury from being accidental. *Re McNicol*, L.R.A. 1916A, 306 and note; *Strasmas v. Rock Island Coal Mining Co.*, 15 A.L.R. 576; *Pinkerton Nat. Detective Agency v. Walker*, 35 A.L.R. 557; *Anderson v. Security Bld. Co.*, 40 A.L.R. 1119.

It follows from what precedes that the meaning of the phrase "out of and in the course of the employment" is not to be determined by the rules which control in cases of negligent default at common law; for one of the purposes of the recent act is to increase the right of employes to be compensated for injuries growing out of their employment. Sundine's Case, 218 Mass. 1, L.R.A. 1916A, 318. The words "out of" refer to the origin or cause of the accident and the words, "in the course of" to the time, place, and circumstances under which it occurred. *Raynor v. Sligh Furniture Co.*, 146 N.W., 665; *Hills v. Blair*, 148 N.W. 243.

Principle Illustrated

There must be some causal relation between the employment and the injury; but if the injury is one which, after the event, may be seen to have had its origin in the employment, it need not be shown that it is one which ought to have been foreseen or expected. *Baum v. Industrial Commission*, 288 Ill., 516, 6 A.L.R. 1242. The decisions of various courts contain practical illustrations of the principle. For example, a claimant was foreman in a shoe factory; an employee who had been repairing machines approached the claimant in a dark room, placed his arms about the claimant's neck and drew his head against a lead pencil which injured the claimant's eye. *Markell v. Daniel Green Felt Shoe Co.*, 221 N.Y. 493, 116 N.E. 1060. Likewise an employee while engaged in his work was struck in the eye by a missile thrown by a fellow servant. *Leonbruno v. Champlain Silk Mills*, 229 N.Y. 470, 13 A.L.R. 522. Again, a workman was injured in a quarrel with another over interference with his work. *Pekin Cooperage Co. v. Industrial Commission*, 285 Ill., 31, 120 N.E. 530. In these cases the injury was held to be by accident arising "out of" the employment. *Socha v. Cudahy Packing Co.*, 13 A.L.R. (Neb.) 513.

An accident arising "in the course of" the employment is one which occurs while "the employee is doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do that thing"; or one which "occurs in the course of the employment and as the result of a risk involved in the employment, or incident to it, or to conditions under which it is required to be performed." *Bryant v. Fissell*, 84 N.J.L. 72, Anno. Cas.

1918B, 764; *Marchiatello v. Lynch Realty Company*, 94 Conn. 260, 108 At. 799. One of the risks involved in the employment is the liability of injury inflicted by fellow servants. *Anderson v. Security Bld. Co., supra.* So it has been stated as a general proposition that the phrase "out of and in the course of the employment" embraces only those accidents which happen to a servant while he is engaged in the discharge of some function or duty which he is authorized to undertake and which is calculated to further, directly or indirectly, the master's business. Annotation—Workmen's Compensation, 1916A, 41; *Darleth v. Roach & Seeber Co.*, 36 A.L.R. 472.

In *Leonbruno v. Champlain Silk Mills, supra*, the New York Court of Appeals used this language: "The risks of injury incurred in the crowded contacts of the factory through the acts of fellow workmen are not measured by the tendency of such acts to serve the master's business. Many things that have no such tendency are done by workmen every day. The test of liability under the statute is not the master's dereliction, whether his own or that of his representatives acting within the scope of their authority. The test of liability is the relation of the service to the injury, of the employment to the risk."

These principles applied to the facts in the present case lead to the conclusion that the injury arose out of and in the course of the employment. But, even so, the appellant finally makes this contention: Even if the claimant sustained "injury by accident arising out of and in the course of the employment," he is not entitled to compensation because his injury was occasioned by his willful intention to injure Squires—i.e., that his assault on Squires occasioned the assult which resulted in his own injury. Section 13. On this point the burden of proof is upon him who claims the exemption under this section; but as there is no finding or adjudication in reference to the contention the cause is remanded for a definite determination of the question whether the claimant's injury was occasioned by his willful intention to injure his assailant.

Remanded.

Vol. I Pages 467 to 528 No. 10

ADVANCE SHEETS

OF

OPINIONS IN CASES

HEARD AND DETERMINED
BY THE

NORTH CAROLINA INDUSTRIAL COMMISSION

RALEIGH

JULY, 1930

OPINIONS TO JULY 1

SUBSCRIPTION PRICE $5.00 PER YEAR
IN ADVANCE

PUBLISHED MONTHLY FOR THE COMMISSION
BY
EDWARDS & BROUGHTON COMPANY
RALEIGH, N. C.

Entered as second-class matter January 25, 1930,
at the post-office at Raleigh, North Carolina,
under the Act of March 3, 1879.

INDEX

Case *Page*

Melvin Williams *v.* J. Marvin Thompson et al. 467
W. B. Cook *v.* Mooresville Cotton Mills et al. 471
Josh Duncan *v.* Manville-Jenckes Company et al. 472
Bob Burleson et al. *v.* The Harris Clay Company 473
Ray Hendricks *v.* Manville-Jenckes et al. 474
J. B. Lyon *v.* Allen Milling Company et al. 477
Chas. Everhart *v.* Thomasville Chair Company et al. 479
Tom Wilkinson *v.* Marion Veneer and Panel Company et al. 480
Robert Rather et al. *v.* Manville-Jenckes Company et al. 482
Hubert Christopher *v.* A. A. Shuford Mill Company et al. 483
C. P. Vaughan *v.* N. C. State Highway Commission 484
Paul R. Griggs *v.* Rex Spinning Company et al. 487
G. F. Sides *v.* Dover Mill Company et al. 489
F. F. Allen *v.* Parkdale Mills et al. 492
Jesse Overton *v.* Eastern Cotton Oil Company et al. 494
W. H. Aycock *v.* George W. Cooper 497
John McGhee *v.* Bridgeton Lumber Company et al. 501
S. M. Hilliard *v.* Carolina Steel and Iron Company et al. 505
Joseph Fenton Peoples *v.* Warren Box and Lumber Company et al. 507
Donnie Lee Honeycutt *v.* Vance Motor Company et al. 510
John Brother *v.* Pasquotank Logging Company et al. 512
W. W. Canter *v.* Surry County Board of Education et al. 514
J. S. Brown *v.* Tomlinson Chair Manufacturing Company et al. 517
Sinclair Waring *v.* Walker & Son et al. 519
John Propst *v.* City of High Point et al. 519

Supreme Court Decisions:

Ormond E. Chambers *v.* Union Oil Company et al. 522
Lewis H. Johnson *v.* Asheville Hosiery Company et al. 525

NORTH CAROLINA INDUSTRIAL COMMISSION

MATT H. ALLEN, CHAIRMAN
J. DEWEY DORSETT
T. A. WILSON
COMMISSIONERS

E. W. PRICE, SECRETARY

ELEVENTH FLOOR RALEIGH BANK & TRUST BUILDING
RALEIGH, N. C.

[Docket No. 26]

MELVIN WILLIAMS, Plaintiff, v. J. MARVIN THOMPSON, Employer, and NATIONAL CASUALTY COMPANY, Carrier, Defendants

Filed May 30, 1930

Burden of Proof.—Upon showing that employee sustained an injury by accident, burden is upon defendant to show that result is due not to accident, but to some external force directly causing the result.

Eyes.—When doctor in eye injury directs, as agent for employer, home treatment, and if more susceptible to gonococci germ at home than at hospital, master chargeable with injury resulting therefrom.

This was a claim from Wake County for compensation due to injury to the claimant's eye.

Hearing was held before Full Commission, at Raleigh, N. C., October 8, 1929, at the office of the Industrial Commission.

Plaintiff represented by *R. L. McMillan*, Attorney, Raleigh, N. C.

Defendants represented by *W. T. Joyner, I. B. Lake, and I. C. Brady of* the law firm of Smith & Joyner, Raleigh, N. C.

Opinion of the Full Commission by Allen, Chairman.

Statement of the Case

One Melvin Williams, a large, strong negro man, 27 years old, who admittedly had never had gonorrhea, sustained an injury to his eye on July 4, 1929, as a result of gasoline, oil and trash falling into his eyes from the carburetor of an automobile. The negro was engaged at the time in handling cement, and had continuously handled the cement bags. Immediately after the gas, oil, and trash fell into his eyes he rubbed them with his hands.

He continued to work, and on the Monday following this injury on Saturday, his eyes became irritated and sore, and he reported the injury to his employer. No medical attention was tendered to him and he continued on to work through the week, or over a period of 6½ days, or until his eyes, to use his own language, "Just got so bad and weak that they run water, and I could not see anything much." The employer then sent him to a doctor, and this doctor testified that he found a very badly irritated condition on the cornea of the right and left eyes, with very small ulcerations on both cornea.

The doctor testified that when the negro came to him he made a microscopic examination, and gave the negro an antiseptic lotion to use after he had cauterized the eyes, and told him to keep the eyes clean; that the antiseptic lotion given to the negro was zinc sulphide, which is used to prevent the spread of infection, and is used in the treatment of venereal diseases; that the solution given to the patient would not destroy or kill the gonococcus germ; that he kept the patient under observation for a few days and his condition got worse suddenly, about five days after his first visit, and that he suspected then gonorrhea ophthalmia, but after about two months treatment in the hospital the negro was released after having lost completely one eye, and fifty per cent vision of the other.

This doctor testified that gonorrhea ophthalmia develops from external infection, and that the infection of this negro's eye occurred after his first microscopic examination; that in his opinion he could have detected gonorrhea ophthalmia by looking at the eyes under light, and without using a microscope; that he made no microscopic examination the first time because the train of symptoms did not indicate gonorrhea ophthalmia; that the symptoms of gonorrhea ophthalmia are swelling, pain, discomfort to light, and a pure discharge; that the incubation period of gonorrhea ophthalmia is from 24 to 48 hours.

At a later hearing, and upon close examination by one of the Commissioners, the same doctor testified that the incubation period was sometimes longer than that, and that he would not venture an opinion as to the extreme length of time for such incubation period, and that anything he might say might be a guess, and that a week would be a rather long time, and that one might find anything in the medical books upon the subject. He further testified upon close examination, when asked if he thought it impossible that the negro had the gonococus germ in his eyes on the 11th when he first examined him, and his answer was: "I don't think it was there, but I would not want to say that it was impossible. I think it most probable that the germ got in there between the 11th and the 16th. However, it is possible that he had it on the 11th, but if he did he did not have the symptoms of gonorrhea ophthalmia." He further testified that the incubation period in the normal eye is shorter than in the genital organs,—that the old saying used to be that if you could get by nine days exposure from urethral gonorrhea you were safe, but that he had seen instances beyond that period, but he thought gonorrhea ophthalmia would develop in the eye in less time; that he would not venture any opinion as to how much shorter this incubation period in the eye is than it is in the genital organs; that in his opinion an irritated eye was ten times more susceptible to gonococci infection than the normal eye.

Another doctor testified that in his opinion an ulcerated inflamed eye was not more susceptible to the gonococci germ than a perfectly normal eye. Later in the testimony this same doctor said "generally a traumatically injured tissue does lend itself to an infection that an injured tissue would not."

This claimant was examined and there was found no evidence of gonorrhea, and according to the undisputed testimony, he not only did not have gonorrhea, but had never had gonorrhea. It was admitted that as a result of this injury the claimant lost the vision of one eye and fifty per cent of the vision of the other eye.

The medical testimony tended to show that the aggravated infection or irritation of the claimant's eyes at the time he was sent to the doctor made them ten times more susceptible to additional infection than the normal eye.

The defendant contends that the plaintiff ought not to recover because he has utterly failed to show that the gonococcus germ which resulted in the loss of one eye and fifty per cent of the vision of the other eye got into his eyes at any time during his employment, or by any article with which he came in contact in the course of his employment.

The Commission fails to see the force of such contention; the claimant was admittedly injured while in the employment of the defendant and he remained in the employment with badly irritated eyes for a period of 6½ days before he was sent to a physician, and when he was sent to a physician, according to the evidence, his eyes were badly inflamed and irritated and a microscopic examination made. Microscopic, according to the Century Dictionary, means "imperceptible through unaided vision."

Upon looking at the patient, the doctor prescribed an antiseptic lotion, and as agent for the employer directed the claimant to go to his home and use the lotion and report back at a later date. The claimant testified that he went to his home, followed the instructions of the doctor, remained in his room and at the appointed time reported back for further examination and that after about five days the doctor found gonorrhea ophthalmia. According to the evidence this claimant followed the directions of his master to the letter and there is no evidence whatsoever of any external infection. The substance which first irritated his eye was a liquid, and while it is true that the doctors say that they do not know whether the gonococci germ could live in gasoline, the leading medical authorities do agree that cultures of gonococci will live at 113° F, and that they will survive for twenty-four hours in a frozen block of ice. It is also true that one of the doctors testified that when he first made a microscopic examination of this patient he did not have gonorrhea ophthalmia but the Commission cannot understand why a microscopic examination is necessary, and in this particular case was necessary later, if the diagnosis can be made by a microscopic examination, or simply looking with unaided vision at a patient. It was also testified by some of the doctors that the incubation period in the eye was from twenty-four to forty-eight hours. This is probably true in the average case but the leading medical authorities all agree that the incubation period depends upon the virulency of the germ, and in some cases where experiments were conducted upon guinea pigs it has been found to vary from twelve hours to twenty-one days. It is not the purpose of the Commission to enter into any controversy with the doctors but we are not satisfied from this testimony that the diagnosis of gonorrhea ophthalmia can be made definitely and conclusively by a microscopic examination, and if the medical authorities can be relied upon such diagnosis cannot be made.

Upon a careful examination of all of the evidence we have these outstanding facts:

1. That on July 4, 1929, the claimant was a strong able-bodied, healthy negro twenty-seven years of age.
2. That on said date, while in the course of his employment, a carburetor containing gasoline, oil and trash was emptied into his eyes, causing severe irritation.

3. That he continued with his work for a period of 6½ days and until his eyes became so inflamed that he was unable to work.

4. That on July 11 he was sent by his employer to a doctor for treatment.

5. That the doctor simply looked at him and prescribed an antiseptic lotion and he elected to direct the claimant to go to his home instead of a hospital.

6. That at the time he first reported to the doctor he had a badly irritated condition the cornea of the right eye and left eye with small ulcerations on the cornea.

7. That on July 11 the injury was diagnosed as gonorrhea ophthalmia.

8. That claimant did not have and never had gonorrhea; that plaintiff followed strictly the instructions of the doctor while home pending the diagnosis of the case.

9. That as a result of the accident and injury claimant has completely lost the sight of one eye and has lost fifty per cent of the vision of the other eye.

It was admitted that the inflamed eyes rendered them ten times more susceptible to infection than the normal eye, and this being so, we fail to see the logic of denying compensation because the loss of vision was due to a germ which had no connection with the original injury unless defendant had shown that the plaintiff was responsible for the external infection in an unnatural or unavoidable manner.

The plaintiff has shown that he sustained an accident which arose out of and in the course of his employment with the result that he lost one eye and fifty per cent of the vision of the other, and if the defendant expects to avoid responsibility, the burden is upon him to show that the result is due, not directly to the accident but to some external force which directly caused the result and which was brought into the injury by the plaintiff. Further, that the claimant cannot be presumed to use greater care or caution in the treatment of his injured eye than that advised by his physician attending him. This claimant was sent to his home by the doctor who was the agent of the master and the doctor is presumed to have known all the surrounding circumstances and if he was more susceptible to the gonococci germ at his home than would have been the case at a hospital, then the master is chargeable with any injury resulting therefrom.

It is ordered that the findings and award of Wilson, Commissioner, be, and the same is hereby affirmed and that the same is hereby adopted as the award and findings of the Full Commission.

[Docket No. 465]

W. B. COOK, Employer, Plaintiff, v. MOORESVILLE COTTON MILLS, Employer, MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed June 12, 1930

PROVIDING WORK.—Where disability has been sustained employer must tender work suitable to capacity of injured employee or pay Compensation for total disability until tender is made.

Hearing was held before the Full Commission at the offices of the Industrial Commission, Raleigh, N. C., on May 30, 1930.

Plaintiff represented by *Mr. C. P. Barringer,* Attorney.
Defendants represented by *Mr. Herring,* Adjuster for the carrier.

Opinion of the Full Commission by DORSETT, Commissioner.

Statement of the Case

This case came up to be heard before the Full Commission on an appeal by the defendants from the findings of fact, conclusions of law and the award of Commissioner Wilson. The carrier contends in its brief that agreements were entered into and compensation paid at the rate of $15.60 per week for temporary total disability following the accident and that the injured worker returned to work on February 10, at an average weekly wage of $21.29. The carrier argues that the plaintiff should not have been allowed compensation for partial disability for the period from February 10 to March 15, and if such partial disability existed, then compensation for that disability under Section 31 should be paid at the rate of $2.82 per week or 60 per cent of the difference between $26.00, the amount being earned by the plaintiff at the time of the injury and $21.29 the wage that the plaintiff could have earned when he returned to work on February 10. The defendants further contend that there was no evidence, or not sufficient evidence to show that the plaintiff was not able to return to work.

In the brief, the defendants contend that the testimony showed that while the injured was not quite normal, was able to work and that this was proven by the fact that he did work.

The records in this case show that the plaintiff was injured on the 17th of September and at that time he was earning $26.00 a week. The records further show that the defendants have paid compensation at the rate of $15.60 per week from September 24, 1929 to February 10, 1930, and that the plaintiff returned to work on February 10, but was not able to work regularly. The evidence shows that the plaintiff was in and out from his work after returning and was put on a job that if he had worked full time he would have received $21.29 per week. The record shows he didn't work full time and the reason was because he was not physically able to work full time and the time sheet of the employer of the time made by this plaintiff since returning to work to March 15, 1930 when he was laid off shows he actually earned per week only $11.76 for the 4 6/7 weeks that he worked on the light job assigned to him by the employer.

The medical testimony in this case is that upon last examination in February the plaintiff had considerable stiffness in the joints where they had been incapacitated; that his knee joints, his ankle and hip joints were all affected; one of the doctors saying it would probably take two months additional time to perfect a cure and the other doctors saying it would probably take from three to six months and that the plaintiff at the present time was 25 per cent disabled when it came to competing in the labor markets for work. In the brief filed by the defendants they contend that the plaintiff is not quite normal. Now if they contend that a man 25 per cent disabled is not quite normal, then this Commissioner agrees with them.

The Commissioner believes that if the plaintiff could be given a job suitable to his condition that his recovery would be faster and our opinion in this is borne out by statements made by doctors that light work suitable to his condition would relieve the stiffness of the joints and get the plaintiff back to normal condition at a sooner date. In this case the plaintiff has been cut off from his work and we beleve that the employer should put forth every effort to put the man back on the pay roll at some light job and pay him the difference between what he was making when injured and what he can earn now as the law provides. If this cannot be done then the insurance carrier must pay compensation at the rate of 60 per cent of the average weekly wage being earned at the time of the injury as provided by the law and pay this until the plaintiff is entirely able to go back to work and compete in the labor markets until they can give him a job. This is the law as we see it. We, therefore, affirm the opinion of Commissioner Wilson and dismiss the case and it is directed that the defendants pay the costs.

[Docket No. 482]

JOSH DUNCAN, Employer, Plaintiff, v. MANVILLE-JENCKES COMPANY, Employer, UNION INDEMNITY COMPANY, Carrier, Defendants

Filed June 12, 1930

Appeal.—Where appeal is not frivolous and made in sincerity, party appealing must make an appearance before Commission or file brief to support grounds of appeal.

Hearing before the full Commission at the Industrial Commission, May 30, 1930.

Jonas & Jonas, Attorneys for plaintiff, not present.
Defendants represented by *Mr. A. W. Fisher*, Adjuster.

Opinion by Dorsett, Commissioner.

Statement of the Case

Commissioner Wilson, on April, 1930, heard the above captioned matter and filed an opinion in the case on May 8, 1930, allowing compensation to plaintiff. Within the required time the insurance carrer made application for review before the full Commission, the carrier stating that he based claim for review on the ground that the award made by the Commissioner is not justified by the testimony presented, as no proof of the occurrence of an accident was offered by the injured. The case was thereupon set for review by the full Commission and under date of May 27, 1930, the Commission received from the insurance Adjuster a letter advising that the said adjuster did not care to make any arguments or present any brief but merely wanted the testimony reviewed by the full Commission and an award rendered.

The testimony in the case has been reviewed by the full Commission and the findings of fact, conclusions of law and the award of Commissioner Wilson are adopted as the findings of fact, conclusions of law and the award of the full Commission.

The Commissioner might state here that it seems to us that when appeals are perfected that if the said appeals are not frivolous and if the ones making the appeals are sincere that they should at least make their appearance before the full Commission or file a brief setting out wherein the hearing Commissioner erred.

In this case it is ordered that all of the costs be taxed against the defendants and the opinion of the hearing Commissioner be affirmed.

[Docket No. 425]

BOB BURLESON, Deceased, and MRS. VIOLA BURLESON, Plaintiffs, v. THE HARRIS CLAY COMPANY, Self-insurer, Defendant

Filed June 9, 1930

FATAL CASES.—Where injury directly results in death although eight months after accident, Compensation payable to dependents with deduction for payments made prior to death of employee.

Hearing before WILSON, Commissioner, at Spruce Pine, N. C., on June 5, 1930.

Plaintiffs appeared in person.
Defendants represented by *F. E. Smith,* Manager, Harris Clay Company.

Opinion by WILSON, Commissioner.

The facts in this case are: Bob Burleson was injured September 2, 1929, by an accident which arose out of and in the course of his regular employment by the Harris Clay Company at Spruce Pine, N. C. His spinal cord was severed between the third and fourth dorsal vertebrae. He was temporarily and totally disabled from the date of the accident until his death April 13, 1930. The burial expenses have been paid. The medical, surgical, and hospital costs have been paid, which totalled $2,348.99. The average weekly wage of the deceased was $15.32. Compensation was paid Bob Burleson from September 2, 1929, until his death at the rate of $9.19, sixty per cent of $15.32 in accordance with an agreement dated November 4, 1929. Since Burleson's death compensation has been paid to his widow, Mrs. Viola Burleson, the only dependent, at the same rate.

The Commission awards compensation to Mrs. Viola Burleson, widow of Bob Burleson, and the only whole dependent, at the rate of $9.19 (60 per cent of $15.32) per week for a period of three hundred and fifty weeks from date of accident as provided in Section 38, less any and all amounts paid Bob Burleson during his last illness and that already paid his widow.

Defendant will pay the cost of this hearing.

[Docket No. 428]

RAY HENDRICKS, Employee, Plaintiff, v. MANVILLE-JENCKES COMPANY, Employer, and UNION INDEMNITY COMPANY, Carrier, Defendants

Filed June 11, 1930

ADDITIONAL EVIDENCE.—Before review by full Commission additional evidence may be taken, but in this case request for review and taking of additional evidence frivolous and a proper case for imposing penalties with all costs against defendants.

Opinion by DORSETT, Commissioner.

Statement of the Case

This case was first heard on April 4, 1930, in Gastonia, N. C., and an Award made in favor of the plaintiff.

The Commission, some few days after the Award was issued, received from the carrier application for review before the full Commission, on the grounds of newly discovered evidence, and that the Award is not justified by the evidence.

The newly discovered evidence is that of one G. T. Strickland made in the form of an affidavit and made a part of this record as if the witness was present and testifying. This arrangement was agreed to by both parties to the proceeding. The affidavit made by this witness, Strickland, is as follows:

Statement of G. T. Strickland, Speeder Section Man, High Shoals Mill

On November 9, 1929, Ray Hendrix, Joe Herlong and C. R. Dempsey were involved in a wreck of a Ford Two-Door Sedan just at the Lincoln-Gaston County lines near Kiser's store and about one-half mile above the High Shoals mill village on Highway No. 16. Ray Hendrix suffered an injury to his right knee as a result of this wreck, the same being apparently fractured. Following the wreck above mentioned, Dave Casket and Charlie Hood came to my house and asked me to get out my car and carry Ray Hendrix to a doctor. This was at two o'clock a.m. November 10, 1929. I carried him to Lincolnton to Dr. J. R. Gamble, who came to his office to render treatment in the case. After Dr. Gamble had treated him, I brought him back to High Shoals and left him at Mr. Herlong's, where he boarded at the time. Two days later I again carried him to Dr. Gamble's for treatment.

On December 2, 1929, Hendrix came back to the mill and asked to be put back to work, saying at the time that he was crippled still from the accident already mentioned, but he felt that he could do the work on the job he formerly held, and needed the work on account of having been out several weeks. Mr. Clanton, the overseer, allowed him to come back on the job of oiling. On January 29, 1930, after he came back to work, at nine o'clock p.m. I flashed the lights in the department, signifying that an intermission of five minutes would be allowed so the men could go outside and smoke, in accordance with regular practice in this mill. I went out myself with the men. Ray Hendrix did not come out, and when I returned to the Card Room after the five minutes were up, Hendrix approached me near the men's toilet and appeared to be limping more than usual. I asked him what was the matter and he said he started up the steps to go out to smoke and stepped on a coco-cola cap or a bobbin, fell and struck his knee on the edge of a step, injuring it anew. I told him he had better see the overseer and go to the nurse. I asked him at this time who saw him fall on the steps and he replied that no one saw it, and that he was alone at the time. The overseer told him that his leg was already crippled and that he wasn't entitled to any treatment by the company, but anyway, he sent me with Hendrix to the nurse. The nurse questioned him as to how he received the injury and he repeated in effect what he had already told me concerning it. The nurse took down his statement and treated his leg, after which Mr. Jack Kay carried him to his boarding house.

Dave Casket and John Farmer could not have witnessed the fall Hendrix claims to have gotten on the steps in the mill as they were in the crowd of men that I conducted outside to smoke. These men went out along with me and came back into the mill with me, and they were not with Ray Hendrix at any time during the five minute intermission.

(Signed) G. T. STRICKLAND.

Sworn to and subscribed before me
this 22 day of April, 1930,
L. H. THOMPSON. (L. S.)
My commission expires on January 11, 1931.

This man Strickland is a "Speeder Section Man," it appears, employed by the defendant employer, and it seems to the Commissioner that had the insurance carrier in this case exercised diligence that this second hearing would not have been necessary, and that it could have had this man Strickland at the first hearing. The Commissioner recalls that the insurance carrier in this case had only two witnesses present at the original hearing; Dr. Lee Johnson, full time physician employed by the employer, and the full time nurse, employed by the employer. No evidence was introduced in the first hearing, nor was there any evidence offered at the second hearing that would impeach the testimony of the witnesses for the plaintiff at the original hearing, or was there any evidence suggested concerning the character of the witnesses for the plaintiff at the original hearing. The Commissioner is at a loss to understand how the defendants in this case can seriously ask the Commissioner to believe this man Strickland, and to say that three witnesses brought by the plaintiff to the hearing when originally heard were misrepresenting the facts. A preponderance of the evidence in this case is in favor of the plaintiff, and from all the evidence the Commissioner makes the following

Findings of Fact

1. The parties to this proceeding are bound by the provisions of the Workmen's Compensation Act of 1929, and that the Union Indemnity Company is the insurance carrier.
2. The plaintiff, on January 29, 1930, while regularly employed by the defendant employer, suffered an accident resulting in total disability since that date; the said accident suffered by the plaintiff arose out of and in the course of his regular employment, and his average weekly wage was fifteen dollars per week.
3. The accident suffered on January 29, 1930, so excited, accelerated and otherwise aggravated the preëxisting condition as to cause the plaintiff's present disability.
4. This case has been defended without reasonable grounds on the part of the defendant insurance carrier.
5. The only evidence offered at the hearing was in the form of an affidavit by G. T. Strickland, which is made a part of this record by agreement.

Upon the foregoing findings of fact the Commissioner bases the following

Conclusions of Law

The facts in this case, as seen by the Commissioner, will be found set out at some length in the statement of the case made a part of the Opinion by the hearing Commissioner, under date of April 16, 1930, when the original Award was issued in favor of the plaintiff. The Commissioner sees no reason to alter the conclusions of law as set out in the Opinion under date of April 16, 1930, and the statement of the case, findings of fact, as amended in this Opinion and conclusions of law of the Opinion of April 16, 1930, are made a part of this Opinion.

Taking the record of this case as a whole, and considering all of the circumstances, we are strongly impressed that the application for review was frivolous, and this is a very proper case for penalty rather than taxing all of the costs against the defendants had we the power so to do. We are satisfied that in this case diligence was not used by the insurance carrier before the case was called at the first hearing. It seems to us that if due dilligence had been used the insurance carrier in this case, or more aptly, the adjuster for the insurance company in this case, could have known all of the facts and not put the Commission and the State to the expense of a new hearing. Action on the part of the insurance company as in this case will tend to make rates in this State higher, and such action is not justified in the least.

It has been found as a fact that this case has been defended without reasonable grounds, and the whole cost of the original hearing and the cost of this hearing will be taxed against the defendants, as provided in Section 62 of the Act.

Award

The defendants will pay compensation to the plaintiff at the rate of 60 per cent of $15.00 a week, or $9.00 a week, from January 29, 1930, and during the period of disability, and furnish to the plaintiff such medical and hospital treatment as in the opinion of their physician is required to lessen the period of compensation and restore the plaintiff's injured knee and leg to normalcy; the defendants will pay Dr. Gamble for attending this plaintiff since January 29, 1930, and will pay to the proper persons any other unpaid hospital and medical bills incurred since January 29, 1930, as result of this accident. The defendants are directed to pay Dr. Gamble ten dollars for his attendance at this hearing, and to pay all of the costs of the witnesses for the plaintiff as well as the defendants for attending the first as well as this hearing. It is directed that all back compensation be paid to the plaintiff in a lump sum out of which the defendants are directed to pay to Mr. P. C. Froneberger, attorney for the plaintiff, the sum of twenty-five dollars.

When final settlement receipt is received the case will be closed.

[Docket No. 453]

J. B. LYON, Employee, Plaintiff, v. ALLEN MILLING COMPANY, Employer, AMERICAN MUTUAL LIFE INSURANCE COMPANY, Carrier, Defendants

Filed June 12, 1930

REVERSED ON REVIEW.—Where evidence does not sustain findings of single Commissioner, award directing dismissal of case.

Hearing was held before the full Commission at the offices of the Industrial Commission, Raleigh, N. C., May 30, 1930.

Plaintiff not represented by counsel.

Defendants represented by *I. C. Brady* of Smith & Joyner, Raleigh, N. C., and *E. L. Gardner*, Attorney, Charlotte, N. C.

Opinion of the full Commission by DORSETT, Commissioner.

Statement of the Case

This appeal is by the defendants from the findings of fact, conclusions of law and an award of Commissioner Wilson. The defendants contend that the award is not sustained by the evidence; that from the evidence the Commissioner was not justified in finding that the accident arose out of and in the course of employment and secondly that the amount of the award is excessive and not justified under Section 2 (e) of the Act.

The accident complained of by the plaintiff was caused when the plaintiff, on his own accord, had the misfortune of slipping on his walk way and falling. It appears from the evidence that the plaintiff was a traveling salesman and was getting ready to go to work for his employer and in filling the radiator of his own automobile in front of his own home he fell as above related and suffered the injury complained of.

The full Commission is of the opinion that this accident did not arise out of and in the course of the plaintiffs employment; the falling on the icy sidewalk was not a risk connected with the plaintiff's employment. No instrumentality of the employment caused the fall or the injury. The injury did not follow as a natural incident of the work and we believe that it could not be fairly traced to the employment as being a contributory, proximate cause of the injury. The causative danger in this case was equally common to the neighborhood. Everybody in that particular neighborhood and possibly as well as throughout the State, whether working or not and who had occasion to step outside their door was subjected to the same danger as the plaintiff, that of slipping on the ice and falling. We have not yet gotten to the stage in which a workman would be entitled to compensation for any accident which happened at any time or place because he was working on a certain kind of employment. We still have accidents in the employment and accidents which are not connected with the employment and therefore a line has been drawn as to the time and place of the accident and the statute has provided the limitation that the accident must arise out of and in the course of employment to entitle the workmen to have a right to recover compensation in respect of it.

It is found as a fact that the accident in question resulting in the disability of the plaintiff did not arise out of and in the course of his employment. The case will be dismissed from the docket, each party paying its own costs.

[Docket No. 494]

CHAS. EVERHART, Plaintiff, v. THOMASVILLE CHAIR COMPANY, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Carrier, Defendants

Filed June 3, 1930

NOTICE OF ACCIDENT.—Where no prejudice shown, and employer had actual knowledge of accident within thirty days, failure to comply with Section 22 no bar to compensation.

Plaintiff represented by *J. R. Proctor*, Thomasville, N. C.

Defendants represented by *I. C. Brady*, of Smith & Joyner, Attorneys at Law, Raleigh, N. C.

Opinion of the full Commission by WILSON, Commissioner.

The above styled case came on for review before the full Commission on May 30, 1930, at Raleigh, N. C., this being an appeal from the decision of Dorsett Commissioner awarding compensation to the plaintiff following the original hearing at Lexington, N. C., April 30, 1930. After a careful reading of the evidence and the defendant's good brief, the Commission affirms and adopts as its own the findings of fact, conclusions of law, and award of the hearing Commissioner.

The attorney for the defendants asks the Industrial Commission in his brief if the Commission is going to give "effect and force to the requirements set forth in Section 22 of the Act in considering the above styled case." Section 22 in part reads:

"Every injured employee or his representative shall immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a written notice of the accident, and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this act prior to the giving of such notice, unless it can be shown that the employer, his agent or representative, had knowledge of the accident, . . ."

The plaintiff sustained his original injury on Thursday, the 19th. He continued to work through the following Wednesday. The plaintiff testified that on Thursday of the following week he spoke to Tom Everhart, a fellow employee, about the condition of his thumb, and he also told the superintendent and asked the superintendent if he could go to a doctor. The plaintiff quotes the superintendent as telling him to wait a day or two and maybe the injury and thumb would get all right. The plaintiff testified that the following Friday morning the thumb was so sore he could not work in the mill; Saturday morning he did not work at all, and that he went to the first aid man, who put some medicine on the injury.

The plaintiff testified that he bruised his thumb tightening up a screw, that is, turning a clamp. The full Commission sees in the record plenty of evidence to sustain the fact that the employer, through his agents, had full knowledge of the injury within the thirty days period stipulated in Section 22. The Commission does not find evidence of any compensation or physician's fees having accrued under the terms of this Act prior to the giving of notice by the injured employee to his employer, or the knowledge of the injury by the employers agent or representative.

The second contention of the defendants is that the accident and injury did not arise out of the employment, or that the injury was an occupational disease, and not compensable. There was evidence submitted by the plaintiff showing that his finger had previously been injured and that the injury was aggravated by the type of work required of him at the employer's plant. Tom Everhart, who is in charge of nine men at the same manufacturing plant, stated that he once had a "bad hand" as the result of a similar incident and injury as the plaintiff's hand was aggravated by his type of work.

The defendants did not submit a scintilla of evidence that the type of injury the plaintiff received to his thumb was common to the work; therefor the Commission cannot agree with the suggestion that the plaintiff's injury was the result of an occupational disease.

Appeal is dismissed.

[Docket No. 6]

TOM WILKINSON, Plaintiff, v. MARION VENEER AND PANEL COMPANY, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed June 9, 1930

DISFIGUREMENT.—Where Award for disfigurement made and change of condition occurs increasing the disfigurement the award will be amended to provide for the additional disfigurement.

KELOID GROWTH.—Where injury results in keloid growth, common to the colored race and no definite way of determining ultimate size award made for additional disfigurement upon change of condition.

Hearing before WILSON, Commissioner, at Marion, on March 22, 1930.

Plaintiff represented by *D. F. Giles*, Attorney at Law, Marion, N. C.
Defendants represented by *M. I. Page*, Attorney, Asheville, N. C.

Opinion by WILSON, Commissioner.

At the hearing in this case Dr. Justice testified as to the possible increase in size of the keloid growth on the neck of Tom Wilkinson, the plaintiff, which resulted from burns sustained in his regular employment July 1, 1929, while working for the Marion Veneer and Panel Company.

On August 28, 1929, Chairman Allen held the first hearing in this case and as the result of the evidence submitted, Chairman Allen issued an award for total temporary disability for a period of nine weeks at the rate of $9.00 (60 per cent of $15.00) per week, and held open the question of disfigurement. The second hearing was held by Commissioner Allen on November 7, 1929, and upon the evidence submitted at this hearing he awarded compensation for disfigurement of the hands and neck, the compensation to be paid for a period of twenty-five weeks at the rate of ten dollars per week, totaling two hundred and fifty dollars. On February 15, 1930, the plaintiff, through his attorney, D. F. Giles, made application for a re-hearing on his case under Section 46 because of a change in condition. At the hearing held March 22, 1930, Dr. Justice testified as to the seriousness of the keloid growths on the colored race, and particularly on the plaintiff because of the unusual position of the growth upon his neck. He testified that there had been an increase in the size of the keloid growth on the plaintiff's neck and there was really no way of telling the ultimate size; that these growths sometimes grow very large and might extend down on plaintiff's breast; that they were the natural consequences of injuries to the pigment of the skin in colored people. There was some reference at this hearing to the loss of use of the left hand of the plaintiff because of his original burns. Both hands are badly scarred. It was agreed at the hearing by both parties that the plaintiff submit himself to Drs. Kirby and Justice for a further and more thorough examination, the doctors to determine and submit to the Commission their opinion as to the permanency of the disfigurement of the plaintiff and as to the future growth of the keloid on plaintiff's neck.

Under date of March 31, the Commission received a letter from the above named doctors giving their diagnosis of the case, in which it was stated in addition to the disfigurements, the plaintiff had a fifty per cent loss of use of the left hand resulting from the above mentioned injury.

Upon the evidence in this case and the report of the examining doctors, the Commission finds as a fact that the plaintiff has had a change of condition in the keloid growth on his neck and that in addition thereto he has a fifty per cent loss of use left hand. Before making the award in this case the hearing Commissioner submitted a recent picture of the plaintiff, made May 10, 1930, to Chairman Allen who conducted the first and second hearing. Chairman Allen agreed that there had been considerable change in the keloid growth on plaintiff's neck.

Under Section 31, (m & t) of the Compensation Act the Commission awards the plaintiff compensation for seventy-five weeks (50 per cent loss of use of the left hand) at the rate of $9.00 per week (60 per cent of $15.00) and in addition thereto under Section 31 (t) for serious facial, head, and bodily disfigurement, the Commission awards the plaintiff $1,000.00, to be paid at the rate of $10.00 per week for a period of one hundred weeks. The disfigurement compensation is inclusive of the original award of Chairman Allen as of November 7, 1929, for $250.00 for serious disfigurement. The compensation for partial loss of use of the left hand shall be paid first and the compensation for disfigurement shall begin immediately upon the completion of the payment for the loss of use of the left hand, and by extending the compensation period. The compensation paid under this award shall be retroactive to the final payment of the nine weeks period awarded under the first award of the Commission, and in addition to this compensation such necessary medical attention as may be required by the plaintiff.

The defendants will pay the costs of this hearing.

[Docket No. 600]

ROBERT RATHER, Deceased, Employee, MRS. BEULAH RATHER, Widow, v. MANVILLE-JENCKES COMPANY, Employer, UNION INDEMNITY COMPANY, Carrier, Defendants

Filed June 11, 1930

Hernia.—Death resulting from Hernia operation does not entitle dependents to Compensation where hernia was preëxisting.

Hearing before Dorsett, Commissioner, at Gastonia, N. C., on June 6, 1930.

Plaintiff represented by *Mr. J. L. Hamme*, Attorney, Gastonia, N. C.
Defendants represented by *Mr. A. W. Fisher*, Union Indemnity Company.

Opinion by Dorsett, Commissioner.

Statement of the Case

The widow and minor children of Robert Rather, deceased, are asking for compensation because of the death of the husband and father, contending that because of an operation for hernia caused by his employment that they are entitled to receive compensation as provided by the Act. When the case was called for a hearing it was agreed that the questions for determination were:

1. Did the deceased suffer a hernia while employed by the defendants meeting the five requirements of Section 2 (r)?
2. Was the death of the deceased a result of an accident arising out of and in the course of employment?
3. Was the death of the deceased the result of the operation for the repair of a hernia?

The facts as developed at the hearing were not undisputed. The wife of the deceased testified that her husband had for a number of years suffered with a hernia; that he wore a truss and that he had been working three or four days for the defendants when he found it necessary to have an operation for the repair of his hernia. The evidence of Mrs. Rather was that some two or three days after he stopped work he was operated upon and died from the operation. Dr. H. R. McConnell who performed the operation testified that on April 15 he operated upon the deceased and that the said deceased was sent to him by the City Charity Organization of Gastonia. The doctor says that when the man was brought to the hospital he was in practically a morbid state; that he had a right strangulated inguinal hernia; that after operating that he was of the opinion that the hernia was of long standing; that he did not know how long; that he found him with a paralysis of the bowels and that he died of it in a toxic condition. On cross-examination the doctor said by mortification he meant that the man was vomiting, he was cold and clammy with practically no pulse and in an extremely serious and stuporous condition and practically dead when he came to the hospital; that he operated upon him as a last resort in an effort to save his life. The doctor said that the deceased's bowels had been in his hernia sac so long that he was practically gone then. From all the evidence in the case the Commissioner makes the following

Findings of Fact

1. The parties to this proceeding are bound by the provisions of the North Carolina Workmens Compensation Act, and the Union Indemnity Company is an intervening party defendant as the insurance carrier.
2. The deceased, Robert Rather, did not suffer an accident arising out of and in the course of his employment.
3. The claimants in this case have not proven the requirements of Section 2 (r) of the Act and it is found as a fact that the deceased for sometime had worn a truss and was suffering with a hernia.

Conclusions of Law

Under the findings of fact in this case the Commissioner directs that an award is issued dismissing the case.

Concerning the costs, each side will pay its own.

[Docket No. 326]

HUBERT CHRISTOPHER, Employee, Plaintiff, v. A. A. SHUFORD MILL COMPANY, Employer, U. S. CASUALTY COMPANY, Carrier, Defendants

Filed June 12, 1930

STEPPING ASIDE.—Where evidence sustains hearing Commissioner's findings that injury occurring while employee was performing work in presence of one of officials of the Company, although not the work he was hired to perform arose out of employment, when on review, will be affirmed by full Commission.

Hearing was had before the full Commission at the Industrial Commission offices, May 31, 1930.

Plaintiff represented by *J. L. Murphy*, Attorney, Hickory, N. C.
Defendants represented by *Ralph V. Kidd*, Attorney, Charlotte, N. C.

Opinion of the full Commission by DORSETT, Commissioner.

Statement of the Case

Allen, Chairman, heard the above captioned matter in Newton, N. C., on April 25, 1930, and rendered an opinion in the case awarding compensation to the plaintiff. From the findings of fact, conclusions of law and award of Allen, Chairman, the defendants appealed on the ground that the award in the case is contrary to the evidence and the law.

The plaintiff in this case, a lad of about seventeen years of age was employed by the defendant employer, and had his left arm torn off above the elbow. In a brief filed by the defendants, they contend that Allen, Commissioner, should not have allowed compensation in this case because the plaintiff was employed to chop waste and not to run the machine. The evidence in the case is to the effect that the plaintiff was permitted in the presence of one of the officials of the company to operate this machine for several hours before he suffered his accident and taking into consideration all of the evidence we believe Allen, Commissioner, has correctly found the facts in the case and has correctly applied the law to the facts and the findings of fact of Chairman Allen and his conclusions of law and the award in the case are hereby adopted as the findings of fact, conclusions of law and the award of the full Commission and the said opinion of Allen, Chairman is affirmed and the case is dismissed.

The defendants will pay the costs in this case.

[Docket No. 636]

C. P. VAUGHAN, Employee, Plaintiff, v. N. C. STATE HIGHWAY COMMISSION, Employer, Self-insurer, Defendants

Filed June 3, 1930

Refusal of Medical Care.—Refusal of medical care bar to Compensation during refusal.

This hearing was heard before J. C. Root, Deputy Commissioner, North Carolina Industrial Commission, at Jackson, N. C., June 3, 1930, office Clerk Superior Court.

Plaintiff represented by *A. C. Gay*, Attorney, Jackson, N. C.
Defendants represented by *H. K. Weatherspoon*, Raleigh, N. C.

Opinion by Dorsett, Commissioner.

Statement of the Case

This case was heard by Deputy Commissioner, John C. Root, in Jackson, N. C., on June 3, 1930. The evidence was stenographically reported and the transcript thereof verified in the Industrial Commission in the manner required by law.

The only questions in dispute were:

(a) Did the plaintiff refuse to accept medical treatment offered by his employer?

(b) When did total disability terminate?

(c) What permanent loss of use has the plaintiff sustained?

Findings of Fact

1. That on March 28, 1930, the plaintiff refused to take further treatment from Dr. Spencer P. Bass, and that such refusal willfully continued until May 24, 1930, on which date plaintiff undertook to sue Dr. Bass for the purpose of having his arm treated, since which date the plaintiff has not been to see the doctor.

2. That, inasmuch as no evidence was offered bearing upon the question plaintiff is presumed to be still totally disabled.

3. That the extent of the plaintiff's permanent injury is a matter with respect to which the Industrial Commission should have the benefit of expert medical testimony.

4. That the plaintiff at the hearing agreed to return to Dr. Bass for treatment on either the 3d or 4th day of June and to place himself in the care of Dr. Bass for a period of four weeks, at the end of which time plaintiff should be examined by Dr. Hugh A. Thompson of Raleigh, N. C.

Conclusions of Law

1. The employer, the North Carolina State Highway Commission, having proffered the plaintiff treatment by Dr. Bass, for whose professional ability the Industrial Commission has high regard, and the plaintiff having failed to give reason sufficient to justify his refusal to accept the treatment offered him by his employer, the North Carolina State Highway Commission is within its rights in invoking the penalty provided in Section 25 of the North Carolina Workmen's Compensation Act. Said Section 25 provides a forfeiture of compensation for refusal to accept medical treatment provided by the employer, in words as follows:

"The refusal of the employee to accept any medical, hospital, surgical or other treatment when provided by the employer, or ordered by the Industrial Commission, shall bar said employee from further compensation until such refusal ceases, and no compensation shall at any time be paid for the period of suspension unless in the opinion of the Industrial Commission the circumstances justified the refusal, in which case the Industrial Commission may order a change in the medical or hospital service."

It will be noted that the refusal of treatment "*shall* bar" an employee from further compensation, and that the forfeiture of compensation continues until the refusal ceases. The plaintiff having been provided treatment which he subsequently refused to accept has no claim for compensation during the period of refusal.

The Employer, therefore, properly suspended the payment of compensation when the plaintiff refused treatment.

We now come to the question of directing the payment of compensation for that part of the plaintiff's disability covered by the period of his refusal to accept treatment. As hereinbefore quoted, Section 25 provides that "no compensation shall at any time be paid for the period of suspension unless in the opinion of the Industrial Commission the circumstances justified the refusal." Obviously there rested upon the plaintiff the burden of showing circumstances in justification of his action. This burden he has not sustained. It will hardly be disputed that the Industrial Commission is without power to award compensation when the plaintiff has refused treatment and has acquainted the Commission with no circumstances justifying his action. To hold otherwise would approach, if in fact it did not constitute, an abuse of power. It should not be out of place here to advert to the fact that the files of the Commission show that by correspondence and by personal interviews had with Wilson, Commissioner, and the Chief Claim Examiner, the claimant was fully advised relative to the effect of a refusal to accept medical treatment offered by his employer. Whether or not the award hereinafter directed would have been any different had it not been for the manner in which the plaintiff was cautioned the Commissioner does not deem it necessary to say.

It would be most unfortunate were it to develop that the plaintiff's action in refusing treatment had caused him to suffer a permanent loss of use or a greater loss of use than he would otherwise have sustained by reason of his injuries. On the other hand it should not be said that the Workmen's Compensation Act contemplates that an employer shall be liable in compensation for loss of use of a member to a greater degree than would have resulted had the employee accepted treatment.

Upon the foregoing it is directed that there issue the following Award:

That the award heretofore issued for the payment of compensation at the rate of $9.00 per week, beginning from November 6, 1929, be amended so as to provide for the payment of compensation from October 30, 1929, disability having continued for more than 28 days; and that compensation be paid through March 27, 1930, the defendants to take credit for amounts heretofore paid; that the defendant pay also the cost of all medical, surgical and hospital treatment heretofore incurred when bill therefor shall have been approved by the Commission.

It is further ordered that the plaintiff report to Dr. Spencer P. Bass for further treatment within 10 days from notice of this award and follow the doctor's instructions for a period of four weeks, and that upon compliance with this order by the plaintiff the defendant resume the payment of compensation as of May 24, 1930, the date upon which the plaintiff undertook to see Dr. Bass for the purpose of receiving further treatment.

It is further ordered that after the plaintiff shall have submitted to the treatment as herein directed the defendant have him reëxamined by Dr. Hugh A. Thompson of Raleigh, a bone specialist, with a view to ascertaining if the treatment has resulted in any improvement of plaintiff's injured arm, and for the further purpose of determining the advisability of performing an open operation.

Should the plaintiff refuse to submit to further treatment by Dr. Bass, as directed, it is ordered that he submit to an examination by Dr. Bass for the purpose of determining what percentage of loss of use of the injured arm plaintiff would have sustained had he submitted to the treatment offered. At this examination the plaintiff may have present a surgeon of his own choice whose services shall be paid for by the plaintiff. (Section 27.)

It is also ordered that each party to this proceeding shall pay its own cost.

[Docket No. 212]

PAUL R. GRIGGS, Employee, Plaintiff, v. REX SPINNING COMPANY, Employer, and GLOBE INDEMNITY COMPANY, Carrier, Defendants

Filed June 13, 1930

TENDERING WORK.—Where employer tenders work suitable to the capacity of the injured, Compensation ceases during such refusal.

Opinion by DORSETT, Commissioner.

Statement of the Case

The claimant in the instant case was injured back in August, 1929. A hearing was originally had before Allen, Chairman, but prior to this hearing both parties had entered into an agreement for the payment of compensation, which agreement was approved by the Commission. On November 30 the defendant sent to the Commission a physician's certificate of termination of disability. On this certificate, under "general remarks," the physician had this to say: "The patient is able to do partial work, beginning December 2, 1929. This should be of a light nature." Whereupon the defendants requested permission to stop compensation and furnish light work to the plaintiff. Allen, Chairman, after hearing the case, issued the following Order:

Paul B. Griggs, employee, plaintiff *v.* Rex Spinning Company, employer and Globe Indemnity Company, carrier, defendants.	Order.

In the above entitled cause it appeared from the evidence that an agreement for compensation was entered into on November 1, 1929, and that on January 4, 1930, application was made by employer to stop payment of compensation upon the grounds that disability had ceased; that on January 8, 1930, the Industrial Commission issued a permission to stop payment.

It appeared from the evidence at the hearing that claimant was physically unable to do other than very light work, due to soreness and stiffness as a result of his injury, and upon agreement between the employer and attorney for the claimant it was ordered that three additional payments of compensation, at the rate of $9.36 per week, be immediately paid to the claimant with the understanding that claimant was to be assigned to light duty, beginning on Monday, January 27, and that he was to continue to work for a period of two weeks, during which time compensation payments were to be suspended, and at the end of which time the Industrial Commission would determine the extent of the temporary partial disability of the claimant.

It is thereupon ordered that the plaintiff be immediately paid the sum of $28.08, and that his claim be assigned for another hearing during the week beginning February 10, at which time the hearing Commissioner will determine the extent of temporary partial disability, and issue an Award accordingly, taking into consideration the wages paid by employer for the light work assigned to plaintiff during the period between January 27 and February 10.

(Signed) MATT H. ALLEN, *Commissioner.*

A second hearing in this case was had before Dorsett, Commissioner, on February 20, 1930, and after the evidence was heard the Commissioner found that the agreement, entered into on January 24, 1930, by the parties to this proceeding, whereby the plaintiff was to receive compensation for three weeks, and, at the end of that period, was to be assigned to light work by the employer. The Commissioner further found that the employer had complied with his part of the agreement, but that the plaintiff had failed to comply with his part, in that he worked only two days at the light work assigned him, and sought other employment, which was the job of selling can-openers. The Commissioner further found that the light work assigned by the employer to plaintiff was suitable to his condition. From those findings the Commissioner denied any further compensation and dismissed the case.

At the request of the rehabilitation department and the plaintiff another hearing was had upon this matter on June 6, 1930, at Gastonia, N. C. The plaintiff was examined, and testified that he had been working at various jobs since the last hearing, but that he was still disabled, and he was now ready to accept a job at the hands of the employer suitable to his condition. The attending physician, Dr. W. M. Roberts, was the only witness other than the plaintiff, who testified. The Doctor says that at this time he can find nothing anatomically wrong with the plaintiff, and that in his opinion the plaintiff is able to do the work of an ordinary laborer; that he is able to do the same kind of work at this time that he was doing when he received his injury; that going to work will probably be a little painful because of the inactivity of the plaintiff since the injury, but that the work will not be injurious to him, and will really benefit him; that the will have to "hurt himself" to get better.

The doctor was asked, on direct examination:

Q. Is he able to perform the work of an ordinary laborer?

A. Yes, I think so.

Q. Do you see any anatomical reason why he should not be able to work?

A. I cannot feel subjective pain, but organically he is sound, and he has had five times the average length of time that we give for such treatment in his case.

Q. Can there be trouble with the sacro-iliac joint?

A. His last X-ray showed no evidence of arthritis or anything of that sort. You see the only things I had to judge on were the muscles of the back. His back is absolutely free, and as I told Paul and Mr. Clark, the only thing that will help him, as I see his case, is to continue exercising, even though it gives him pain at the time he should do it; he has to hurt himself to get better.

Upon the evidence in this case the Commissioner makes the following

Findings of Fact

1. The parties to this proceeding are bound by the provisions of the Workmen's Compensation Act, of 1929.

2. From the medical testimony the period of temporary total disability caused by the injury has terminated, and plaintiff is not suffering any permanent disability or loss of use of any of the members.

3. Since the plaintiff refused the light work assigned him, suitable to his condition, he is not entitled to compensation during that period of refusal.

Upon the foregoing findings of fact are based the following

Conclusions of Law

There is no doubt in the mind of the Commissioner with reference to the disability suffered by the plaintiff in the instant case. He was disabled for some period of time after his injury, but there is also no doubt in the mind of the Commissioner with reference to the treatment offered plaintiff by his employer. The employer has fulfilled his part of the law, as we see it, and has paid compensation during the period of temporary total disability; he has offered plaintiff work suitable to his condition in addition to medical treatment, and plaintiff saw fit to refuse the selected work suitable to him as offered by his employer.

The evidence now is that plaintiff is able to do the work he did at the time of his injury, and the case will therefore, under the evidence, have to be dismissed, and it is so ordered.

[Docket No. 343]

G. F. SIDES, Employee, Plaintiff, v. DOVER MILL COMPANY, Employer, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Carrier, Defendants

Filed June 12, 1930

KIDNEY STONE.—Where occurrence of accidental strain is proven, the finding of a kidney stone does not force the conclusion that the kidney stone existed prior to the accident or defeat right to compensation.

Hearing before DORSETT, Commissioner, at Charlotte, N. C., June 5, 1930. Defendants represented by *C. A. Anderson*, Adjuster, Charlotte, N. C.

Opinion by DORSETT, Commissioner.

Statement of the Case

The plaintiff in this case is asking for compensation because of an accident suffered on September 25, 1929, about five o'clock in the afternoon caused by lifting a warp along with three other men who were helping him and the warp weighing about six hundred pounds. The plaintiff contends that he strained his side and back and that in the strain he injured his kidneys and that he has been disabled from September 25, 1929, with the exception of a period of two weeks time, to January 1, 1930.

The defendants deny liability in this instant case on the grounds that the plaintiff is not suffering from an accident that arose out of and in the course of his employment but from a stone in the kidney.

Quite a bit of evidence was heard in the case from witnesses on both sides. Among the witnesses that were examined were five doctors.

The average weekly wage earned by the plaintiff at the time of the accident was $24.40. The defendants admit that the plaintiff was regularly employed and that he was on the job at the time he says he received his injury. The plaintiff says that in lifting the warp he felt a strain in his side. In his words: "It seems like there was a paralysis from here up, (indicating). We finished putting up the warp and I said to the fellows 'I am hurt,' I hurt my side some way. My overseer came by a few minutes later and I told him I was hurt and I got desperately sick and went home at five-thirty not able to finish the day's work." The plaintiff says he didn't rest any that night and walked the floor.

Dr. Ben Gold, the attending physician, says that he saw the plaintiff pretty soon after the injury; that he saw him at one o'clock in the morning. The doctor was asked "Have you an opinion as to what brought about the hemmorrhage which in your opinion you say he had at that time." A. "I think he had an injury from a strain of lifting plus the external violence which gave the hemorrhage." The doctor testified that some few weeks after he treated him that he was sent to Charlotte and that upon a second examination in Charlotte some several weeks after the accident; that the doctors down there found a stone and that Dr. Squires thought that the stone was formed from a blood clot.

Dr. Squires, a kidney specialist of Charlotte, testified that he saw the plaintiff on October 7, two weeks after the plaintiff said he strained himself lifting a warp. The doctor says he made a note on his records on the date he first saw the plaintiff to the effect that in all probability there was apparent nephritis produced and when asked what that was the doctor said an inflammation of the kidney; that from the history he received and from the plaintiff himself and the doctor X-rayed and examined him in Shelby he was of the opinion that the plaintiff had injury to his left kidney. Concerning the length of time that it takes a stone to develop, Dr. Squires stated that from his experience he has known stones to occur in a short period of time, a week or ten days in some instances and that sometimes they form very rapidly.

From all of the evidence in the case the Commissioner makes the following

Findings of Fact

1. The parties to this proceeding are bound by the provisions of the North Carolina Workmens Compensation Act of 1929, the American Mutual Liability Insurance Company is an intervening party defendant as the Insurance Carrier.

2. The plaintiff on September 25, 1929, while regularly employed at an average weekly wage of $24.40 suffered an accident that arose out of and in the course of his employment resulting in disability from the date of the injury to January 1, 1930, less a period of two weeks.

3. Disability caused by the accident terminated around January 1, 1930. Upon the foregoing findings of fact are based the following

Conclusions of Law

In this case we have a man who says that prior to lifting the heavy warp on the 25th of September, that he had never been sick or had occasion to use a doctor and that immediately following the strain caused by the heavy lifting he suffered excruciating pain, necessitating his leaving his job and calling a doctor at one o'clock in the morning; that in the medical evidence there is no way for the Commissioner to arrive at the conclusion that the plaintiff was suffering from a stone in the kidney at the time of the lifting on September 25. The kidney specialist who testified told us that it was possible for a stone to develop in a short period of time and one of the doctors stated that the stone probably came from a blood clot. Who is able to say the stone did not develop after the strain caused by the accident? We believe that in the instant case the plaintiff has sustained the burden of proof in proving that he suffered an accident that arose out of and in the course of his employment and that he is entitled to receive compensation. The following award will therefore be issued.

Award

The defendants are directed to pay compensation to the plaintiff at the rate of 60 per cent of $24.40, or $14.64 a week for the period from September 25, 1929, to January 1, 1930, less two weeks and pay to the proper persons all of the hospital and medical bills incurred because of the accident and concerning the costs of this hearing, each side will pay its own.

The defendants are directed to pay to the Drs. Gold and Squires, Hipp and McKay their charges to be approved by the Commission for attendance upon the hearing. Upon receipt of final settlement receipt the file in this case will be closed.

[Docket No. 633]

F. F. ALLEN, Employee, Plaintiff, v. PARKDALE MILLS, Employer, and TRAVELERS INSURANCE COMPANY, Carrier, Defendants

Filed June 13, 1930

SUBLUXATION OF SPINE.—Where medical evidence does not sustain plaintiff, award will issue dismissing claim.

Hearing held before DORSETT, Commissioner, at Gastonia, N. C., on June 6, 1930.

Plaintiff represented by *Hamme & Dolley*, Attorneys.
Defendants represented by *D. V. Walker*, Adjuster.

Opinion by DORSETT, Commissioner.

Statement of the Case

The file in this contains an agreement under date of January 31, 1930, for the payment of temporary total disability. The file also contains a final settlement receipt for the payment of four weeks disability. The only issue at the hearing with reference as to whether or not the plaintiff is still disabled because of the accident suffered.

When the case was called there happened to be in the Court room two of the leading physicians of the City of Gastonia, Drs. Glenn and Garrison, and upon request by the Commissioner these two gentlemen gave the plaintiff a thorough examination. The plaintiff brought as his witness to the hearing Dr. A. A. Heh, a chiropractor of Gastonia. The physician selected by the employer was also present and testified. The record is full of medical testimony.

The plaintiff says that he has received from the defendants four weeks compensation; that he has been disabled ever since his accident; that he is now having trouble with his head, neck and back and that he believes he is entitled to receive compensation until he is physically able to return to work.

Dr. W. H. Scruggs, the attending physician, selected by the employer, was the first doctor that testified. His testimony was to the effect that on the night of December 30, 1929, he was called to see the plaintiff within about thirty minutes after the plaintiff was supposed to have fallen down a flight of stairs and injured himself. Dr. Scruggs said the plaintiff would not talk to him and he could find no marks indicating injury or bruises; that he called an ambulance and got a special nurse and gave him a hypodermic and the next morning called Dr. Garrison to make an X-ray and he was under the impression that Dr. Garrison made two or three pictures; he says the plaintiff was kept in the hospital three days and didn't improve and since the plaintiff wanted to go home they allowed him to go. The doctor says he has seen him several times since and has treated him and is of the opinion that the plaintiff is as well as he has been for sometime and is able to do the same kind of work he was doing before the accident.

Dr. Garrison, after spending about an hour in giving the plaintiff a thorough examination was called to the witness stand and the substance of his testimony is that he finds the plaintiff of low mentality and he couldn't get sufficient evidence from him to do him much good in forming an opinion about the case. The doctor says he finds no marks in going up the back bone. He found where the plaintiff said he was sore in the lumbar region and found where he complained of soreness in the back of the neck near the back of the skull. He says that the plaintiff had a very uncertain gaze in looking up at the ceiling; that he couldn't walk well. The doctor said as to his condition that he couldn't measure pain but found nothing that would indicate he had a real genuine injury. The doctor was asked if he found anything to indicate he had an injury that was serious or anything that caused him to be disabled and the doctor replied that he just didn't find those things and he couldn't find anything that would give the symptoms that he had. He found him nervous and trembling and couldn't get much out of him but found no anatomical reason why he should be disabled.

Dr. Glenn was next and he said that he didn't find much more wrong with the plaintiff than had always been wrong with him. He said he had known him for thirty-two years and had practiced in his family and that he had been mentally and physically defective all his life and his condition appears very much like it had been ever since he had been knowing him; the doctor was asked if he found any reason why he should be worse off now than he has been for the past few months and the doctor answered that he did not.

The Commissioner right much puzzled by the plaintiff in this case. He apparently knew what was going on when he was on the witness stand and was being examined and cross-examined and answered yes sir, in an intelligent manner. The doctors however, that testified say that they could get nothing out of him at all while examining him and leaves the impression with the Commissioner that maybe the man is concealing something. From all of the evidence in the case the Commissioner does not believe that the plaintiff has ever suffered an accident arising out of and in the course of his employment, notwithstanding the fact that the defendants have paid compensation, medical and hospital bills up to the present time and the Commissioner is of the opinion, from the medical testimony, that the plaintiff has been disabled for sometime and that the fall that occurred on the steps of the mill was not caused by any accident in itself but was a result in all probability of diseased condition of the plaintiff and not chargeable in any manner to his employment.

Dr. A. A. Heh was sworn and testified to the effect that he had been treating the plaintiff for some few weeks and that he found him suffering from a very painful condition between the base of the skull and the atlas and explained that the atlas was the first bone of the spine and the doctor said he found the atlas was slightly subluxated to the right side. He said the plaintiff complained of head aches and blind spells and got dizzy and sick at the stomach and vomited. He found him very nervous and upon examination found several other prominent subluxations in different regions. The doctor was asked to explain what subluxation was and he said it was a partial dislocation. Upon all the evidence in this case the Commissioner makes the following

Findings of Fact

1. The parties to this proceeding are bound by the provisions of the Compensation Act of 1929. The Travelers Insurance Company, an intervening party defendant is the insurance carrier.
2. The defendants have paid four weeks compensation, hospital and medical bills to the physicians of their choice because of the condition they found the plaintiff in on the night of December 30, 1930.
3. Temporary total disability resulting from the fall suffered by the plaintiff terminated when the plaintiff was discharged by the attending physicians as able to return to work.
4. The disability complained of by the plaintiff at the present time is not the result of the fall he suffered while in the employ of the Parkdale Mills.

Upon the foregoing findings of fact are based the following

Conclusions of Law

In this case there is absolutely no competent medical testimony upon which the Commissioner can say that the plaintiff is entitled to receive compensation for the disability he complains of. In this case there is a serious doubt in the mind of the Commissioner concerning the matter of whether or not the plaintiff really sustained an injury by accident that arose out of and in the course of his employment. The defendants entered into an agreement, however, and have paid compensation and they are not asking that they be relieved of the medical bills or that they be reimbursed for the compensation already paid out. The Commissioner cannot help believing, however, that they have paid compensation in this case to a plaintiff that could not sustain the burden of proving that he suffered an accident that arose out of and in the course of employment.

Award

It is directed that an award be issued denying further compensation and that the case be dismissed.

[Docket No. 510]

JESSE OVERTON, Employee, Plaintiff, v. EASTERN COTTON OIL COMPANY, Employer, MARYLAND CASUALTY COMPANY, Carrier, Defendants

HERNIA.—Where five requirements of act are met operation must be tendered by employer to repair the hernia.

This case was heard by Deputy Commissioner John C. Root on June 3, 1930, at Elizabeth City, N. C., where and when the testimony of the witnesses was stenographically reported. A transcript of the evidence has been certified to the Industrial Commission by the Deputy Commissioner as required by the Workmen's Compensation Act.

Plaintiff represented by *Geo. A. Spence*, Attorney, Elisabeth City, N. C.
Defendants represented by *J. H. Naylor*, Maryland Casualty Company.

Opinion by DORSETT, Commissioner.

Statement of the Case

The plaintiff, Jesse Overton, while in the performance of certain duties incident to his employment with Eastern Cotton Oil Company alleged that he received injuries on February 13, 1930 which resulted in a hernia. The plaintiff testified that he was pushing fertilizer into a hole with a shovel when the shovel was struck by a wheel, thrusting the end of the shovel handle against his abdomen or groin. The evidence tended to show that the plaintiff was required to break up clods or lumps of fertilizer and feed them through a hole in a box wherein there was a wheel with flanges which caught up the fertilizer and placed it in position where it could be taken upstairs by cups attached to a moving chain. The defendants offered evidence in an effort to show that the direction in which the wheel revolved would cause a shovel to be drawn into the box instead of being thrust outward. This was the only evidence which in any manner tended to contradict the testimony of the plaintiff. We are unable to attach to this evidence sufficient weight to discredit the plaintiff's testimony. There were no eyewitnesses to the accident. The plaintiff stopped work immediately after he was struck with the shovel, complained that he was sick, vomited, felt numb in the abdominal region, and felt pain the following morning. A few days after his injury the plaintiff told Mr. N. C. Ives, the defendant employer's foreman, he would have to see a doctor. Plaintiff was requested to report to Dr. C. R. Williams, and was examined by Dr. Williams on the 25th day of February, at which time plaintiff was found to have a complete hernia. Plaintiff testified that he first nǒticed swelling the night following the accident. Dr. Williams testified that when examined by him the plaintiff gave a history of having been hit in the groin followed by the appearance of a lump in the groin the next day and the appearance of swelling of the scrotum about four or five days afterwards. Dr. Williams said that when he examined the plaintiff (twelve days after the accident) he found no evidence of an external injury—just found a complete hernia—and that he had no way of knowing whether it was a recent or old hernia. The plaintiff was fitted with a truss and lost plaintiff no time from his work until his services were no longer needed by his employer. Asked if he was ever ruptured before the plaintiff replied "no sir." This statement was not contradicted. Plaintiff has not been operated upon for the cure of his hernia.

From all of the evidence the Commissioner makes the following

Findings of Fact

1. That Jesse Overton and the Eastern Cotton Oil Company are subject to the provisions of the North Carolina Workmen's Compensation Act, and that the Maryland Casualty Company is the employer's insurance carrier.

2. That Jesse Overton, the plaintiff, received an injury by accident arising out of and in the course of his employment with the Eastern Cotton Oil Company, which injury resulted in a hernia.

3. That to the date of the hearing of this case plaintiff has lost no time from his work on account of his injury.

4. That the plaintiff's average weekly wage will be ascertained by the Industrial Commission from the pay-roll report to be made by the employer and to be filed with the Commission by the insurance carrier.

Conclusions of Law

1. The plaintiff has proven to the satisfaction of the Commissioner that he has sustained a compensable hernia, the cause and appearance of the hernia meeting the five requirements of Section 2 (r) of the Workmen's Compensation Act, which are as follows:

(a) That there was an injury resulting in hernia or rupture.
(b) That the hernia or rupture appeared suddenly.
(c) That it was accompanied by pain.
(d) That the hernia or rupture immediately followed an accident.
(e) That the hernia or rupture did not exist prior to the accident for which compensation is claimed.

2. The failure of the plaintiff to *immediately* inform his employer that his nausea and pain were due to the accident has not been prejudicial to the employer as evidenced by the fact that the claimant continued to work until he was discharged. In this connection it should be stated that Dr. Williams testified at the hearing that he didn't know of any reason why the plaintiff could not undergo an operation with safely.

The defendant, therefore, cannot successfully invoke the forfeiture provided in Section 22 of the Workmen's Compensation Act.

Award

It is therefore ordered that an award issue requiring the defendants to tender to plaintiff an operation within thirty days from date, and that upon failure to do so the plaintiff is authorized to procure such operation, the cost of which shall be borne by the defendants; and that the defendants pay to the plaintiff compensation at the rate of 60 per cent, of his average weekly wage so long as temporary total disability may continue on account of said operation, as provided in Section 29 of the Act.

It is further ordered that the defendant pay the cost of this proceeding.

[Docket No. 248]

W. H. AYCOCK, Deceased, Employee, Plaintiff, v. GEORGE W. COOPER, Employer, Defendant, No Carrier

Filed June 15, 1930

SAME BUSINESS OR ESTABLISHMENT.—Where one business is conducted on the same premises, under one roof, the employees being interchangeable, and five or more employed this brings the employer within the Act.

Hearing was held before the Full Commission, May 31, 1930.

Plaintiff represented by *O. B. Moss*, Attorney, Spring Hope, N. C.

Defendant represented by *J. C. Biggs*, Attorney, Raleigh, N. C., and *Yarborough & Yarborough*, Attorneys, Louisburg, N. C.

Opinion by WILSON, Commissioner.

Probably no case has yet been presented to which the Commission has given so much time and consideration as this, and in all fairness to my colleagues and myself we desire to have it understood that the findings and conclusions herein reached were given more careful consideration from every possible vantage of scrutiny because of the unfortunate circumstances involving the defendant as hereafter related, as well as, the most unfortunate loss by a family of its head and bread winner. These dependents are in need of the benefits of the Act to which we have found them entitled and they should not be further denied the same.

The defendant, prior to July 1, 1929, called at the Commission's offices and was fully advised as to the operation of and effect of the Act and was introduced to an insurance broker who happened to be present and an application was signed by defendant, for a policy which was issued, but upon receipt of the policy the defendant, either being ill advised, or confident that from his past experience no accidents could occur at his plant, did not accept the policy. Six months later, on December 31, 1929, the deceased, W. H. Aycock, while repairing a defective boiler for the defendant by whom he had been employed for several years, received injuries resulting in death being by accident that arose out of and in the course of his employment.

The defendants, after the return of the policy in July and to date, has not provided any insurance against his compensation liability nor has he rejected the operations of the Workmen's Compensation Act. On January 17, 1930, the dependents of the deceased filed claim with the Commission for compensation in accordance with the Act. On January 24, 1930, upon due notice to all interested parties, Commissioner Dorsett conducted a hearing at Louisburg, N. C. and upon the evidence presented, he filed an opinion on February 6, 1930, setting fully forth his findings of fact and conclusions of law and directed that an award be issued in conformity therewith. On February 7, 1930, an award was issued.

Yarborough & Yarborough as counsel for the defendant received by registered mail a copy of the award on February 8, 1930. On February 17, 1930, enquiry was made by the Commission of the defendant of its intention to comply with the award. On February 21, 1930, the defendant's counsel requested permission to introduce additional evidence of the defendant himself so that the truth might be developed. On February 25, 1930, the defendant's counsel was advised that the matter of introduction of additional evidence would be considered by the Full Commission. On March 10, 1930, the defendant's counsel filed a letter setting forth the matters he desired to be heard upon.

The plaintiff dependents on March 18, 1930, filed protest and objection to reopening the case for the taking of additional evidence. On April 28, 1930, upon due notice to all parties, the case came before the Full Commission and Mr. Cooper, the defendant, was examined particularly with reference to correcting or clarifying his evidence given upon the first hearing on January 24, 1929, all of which proceeding was duly objected to by the plaintiff. The Commission cannot see but that the additional evidence of Mr. Cooper leaves his testimony in such a state of conflict and so wholly at variance with actual physical facts as exist at this plant, that, except where favorable to the plaintiff, the Commission concludes that all other evidence of Mr. Cooper is discredited. Upon its own motion the Commission had Mr. Mauro and its secretary, Mr. Price, make an inspection of the plant of the defendant.

On May 31, 1930, after due notice to interested parties, the matter was again called before the Full Commission and the evidence of Mr. Mauro giving the result of his and Mr. Price's inspection was taken. Since that date Commissioner Dorsett has made an inspection of the defendant's plant. These inspections determined that the planer and machinery for the use of the wagon shop were under the same roof; that the defendant's reference to the planer being under a shed does not represent the facts; the roof and building being continuous over the two; that the defendant's books were not kept separately and that the manufacture of truck bodies and lumber and hogshead and box materials are all designated on the defendant's bill head as his business; that the employees were interchangeable between the planer shop and the wagon shop and that the machinery in the wagon shop was being used to sharpen the planer knives at the time of the inspection.

Upon review of all the evidence and argument of Counsel, the Full Commission is of the opinion that the findings of fact made by Dorsett, Commissioner, was warranted and substantiated by its greater weight and are adopted as the findings of the Full Commission. The additional finding is made that the business or establishment operated by the defendant consisted of a planing mill with a shop appurtenant thereto and a wagon shop, box manufactory and barrel heading manufactory. After receipt of the opinion filed by Dorsett, Commissioner the defendant was permitted to testify for the purpose of clarifying the record, as to the planer not being in the same building as the shop, as to the interchangeable nature of the employment by his employees and the use of the shop machinery for the use and benefit of the planer. At the time the Commission's representatives were making the inspection one of the employees who operated the planer was in the shop sharpening the planer knife on the emery wheel in the shop; the planer is now and has been under the same roof and in the same building as the shop and the payroll shows the employees have been interchanged even since this accident occurred. The conclusions of law in the opinion filed by Dorsett, Commissioner when considered in connection with the facts in the case is a correct interpretation of the law is applicable, these conclusions being adopted by the Full Commission.

The defendants cite us to a case from Georgia, 142 S. E. 907, which they argue makes a separation of the units of the defendants business or establishment necessary before it can be concluded that he had five men employed in the same business. While this case may be accepted by our Superior Court as a light by which they may reach a correct conclusion herein, nevertheless, we feel that they will not admit being bound thereby and would not reverse this opinion on this single citation, even though it were impossible to easily distinguish that case from this.

The point of distinction which seems to have escaped the attention of the defendant herein between the Georgia case, *supra*, and the instant case, is that the Georgia Act does not read like the North Carolina Act and does not contain a clause similar to section 2 (a) of our Act, defining employment. The decision cited was based upon a construction of Section 15 of the Georgia Act which exempts from the application of the Act: "Any person, firm or private corporation that has regularly in services less than ten employees in the same business in this state."

The Georgia Court concluding that where a person operating a gin and a saw mill on the same premises by the use of a common source of steam power and the two operations combined employed more men than ten his operations were exempt because the two operations was not the "same business."

As stated our Act differs from that of Georgia, nevertheless, we could take issue with this decision upon the definition of business as found in Webster's International Dictionary and Black's Law Dictionary, Page 158. Webster says "Business is any regular occupation or employment habitually engaged in, especially for livelihood or gain." Black says, "This word embraces everything about which a person can be employed." In *LaCroix v. Frechette*, 145 Atl., 314, the Supreme Court of Rhode Island construed "the same business" as follows: "The question then is: were they employed in the same business? The Compensation Act affects the public welfare; it is to be given a liberal construction to fulfill its purpose and to extend its benefits to the largest possible number of employees. Considering the purpose and scope of the whole Act, it is clear that the phrase in Section 3, in the same business, is not restricted either by its terms or meaning to employment in the usual or principal business of the employer. Such business may be any one or all of the employer's business activities which are carried on for the purpose of gain or for the securing of a livelihood."

The point that differentiates our Act from both the Georgia and the Rhode Island Act is Section 2 (a) defining employment as "all private employments in which five or more employees are regularly employed in the same business or *establishment*." It is true that Section 14 (b) of our Act is similar to Section 15 of the Georgia Act, but applying the principal of *ejusdem generis* in our construction of the legislative intent we conclude that the wording of Section 14 (b) was intended to be enlarged by the specific inclusion of establishment as a definition of what would constitute the same business. Establishment is defined as "Regular means of support or sustenance, a permanent, civil, military or commercial force or organization, permanent place of residence or business."

As was said by the Pennsylvania Court in *Pershing v. Citizens Traction Company*, 144, Atl., 97: "The regular course of business means an ordinary operation which may be required to carry out the master's work." The defendant lays much stress upon the word "same" as defining the nature of the business in which an employer must be engaged before his operation can be brought within the Act.

We do not anticipate that our Court would hold that the Act should be so restricted and that such a narrow construction placed upon it that a person's business would have to be segregated into its component parts before counting off the number of employees engaged in each integral part to ascertain if an employer was within the Act.

Black's Dictionary, page 1055, states: "The word 'same' does not always mean 'identical,' nor different or other. It frequently means of the kind or species, not the specific thing, *Craps v. Brown*, 40 Iowa, 487." Does the Act intend that a business wherein a general repair shop is operated in connection with the sale of automobiles wherein five persons are employed in the entire operation but not five in either should be excluded?

Similarily an ice plant makes and sells ice, also makes ice cream; should each department be considered a separate business or the entire operation as being the same business?

We can conceive of Mr. Cooper owning and operating a department store, in the town of Louisburg in addition to his operation conducted at the planing mill and not be required to consider the number of employees at one of the places in determining if his operations at the other came within the Act. Mr. Cooper had one business and establishment on his premises in the outskirts of Louisburg all adjoining, practically all under one roof, the planer and shop being under one roof, the employees interchangeable and in the operations there conducted there was regularly employed five or more employees thus bringing his operations within the Act and giving the dependents of the deceased the election of accepting compensation on starting an action at common law (Sec. 68b). The dependents have elected to accept the compensation benefits and must agree that the conclusions expressed by Dorsett, Commissioner, in his opinion is correct. Without passing upon the question of the rights of the plaintiff because of the failure of the defendants to give notice of appeal from the award within the time prescribed by the Act, it is directed that an award be issued affirming the findings and conclusions of the opinion of Dorsett, Commissioner, filed on February 6, 1930, and confirming the award issued therein on February 7, 1930, except that the penalty will be figured as of current date since the defendant is still in default. The defendants will pay the costs of this appeal.

[Docket No. 458]

JOHN McGHEE, Plaintiff, v. BRIDGETON LUMBER COMPANY, Employer, and MARYLAND CASUALTY COMPANY, Defendants

Filed May 31, 1930

DISFIGUREMENT, TESTICLE.—Loss of testicle is serious bodily disfigurement for which Compensation is awarded.

Hearing before WILSON, Commissioner, at New Bern, N. C., April 10, 1930.

Plaintiff represented by *Wm. F. Ward*, Attorney at Law, New Bern, N. C.
Defendants represented by *S. W Bailey*, Adjuster, Raleigh, N. C.

Opinion by WILSON, Commissioner.

Admitted: It is admitted that plaintiff, John McGhee, received an injury to his penis and both testicles on September 23, 1929, which resulted in a serious and permanent injury and the total loss of the left testicle by removal by surgical operation.

There are only two issues involved in this case:

1. Whether the plaintiff has a serious bodily disfigurement as a result of the removal of his left testicle.
2. Whether the plaintiff is totally disabled as a result of the removal of the left testicle and the injury sustained September 23, 1929.

Dr. Jones who treated the plaintiff testified that the plaintiff gave a history of being hit in the privates with a knot of wood; that when he came to the doctor's office the testicles were swollen and discolored; that the plaintiff had an ecchymosis of the penis and both testicles; that he put the plaintiff to bed; that the plaintiff developed an orchitis on the right side; that the plaintiff was kept under treatment until the orchitis subsided and got better; that the hospital let the plaintiff go home where he attempted to work and after an hour and a half or two hours he had to quit; that the next time the doctor saw the plaintiff the plaintiff had developed a traumatic hydrocele on the left side; that the bag was swollen and contained water; that it was about the size of a goose egg; that the plaintiff reëntered the hospital where his left testicle was removed; that at the time the testicle had degenerated and gone; that the plaintiff has suffered an injury from which he has a bodily deformity; that when the doctor discharged the plaintiff as being able to return to duty, he did it in good faith and according to his best surgical judgment; that if there is anything wrong with the hip joints and pelvis of the plaintiff the doctor cannot tell it. The Dr. says he is unable to tell whether there is any defect in the remaining testicle. Dr. Jones further testified that "the testicle to a man is like the ovary to a woman; it is the organ of sex and has its influence upon the mind and physical make up of the man or woman. They say that every man who has ever amounted to anything was fully sexed." Dr. Jones gave as his opinion that the plaintiff should have been able to return to work about the last of December, 1929. Dr. J. F. Patterson testified "that the function of the testicle is two-fold. The first is sex. In a man sixty-four years of age (the age of the plaintiff) it would probably be a matter of impairment. One of the main functions is internal secretion. They are absorbed and have a powerful influence on the balance of secretion of the other glands and keeping one's resistance up to par and the physical being up to par. I would say the removal of one testicle, if the other is all right, would not have much effect, provided the other testicle would be able to take up the function of the lost testicle. But if the other testicle is damaged and could not take up the function of the lost one in addition to performing its own functions, the loss of the testicle would have a serious effect." Doctor Patterson further testified that if the remaining testicle is damaged and cannot take up the function of the lost testicle the plaintiff would become fatigued and not able to work as heretofore; that he does not know the condition of the right testicle and nobody knows the condition.

A good deal of testimony was submitted by the plaintiff proving a good character and the fact that he was unable to work at the present time. This testimony came from his neighbors, fellow workers and employer.

The plaintiff has not worked since the date of the accident on September 23, 1929, with the exception of a short time consisting of a few hours between his visits to the hospital. Plaintiff's average weekly wage was $21.00.

Upon the evidence in this case the Commission makes the following

Findings of Fact

1. That both parties had accepted the provisions of the Compensation Act.

2. That plaintiff sustained an accidental injury to his penis and both testicles on September 23, 1929, which arose out of and in the course of his employment, as a sawyer by Bridgeton Lumber Company when a knot from a log hit him; that he developed an orchitis on the right side; that plaintiff was totally disabled from September 23, 1929 to December 31, 1929; that shortly thereafter plaintiff developed a traumatic hydrocele around his left testicle; that the left testicle was removed by operation.

3. That plaintiff was temporarily and totally disabled from September 23, 1929 to December 31, 1929; that his present physical condition shall be determined upon an examination by the Commission's medical doctor.

4. That plaintiff has a serious bodily disfigurement because of his left testicle being removed as a result of the accidental injury on September 23, 1929. The plaintiff's average weekly wage was $21.00.

Conclusions of Law

The Commission will first take up the question of serious bodily disfigurement as defined in Section 31 (t) as follows: "And provided further that the Industrial Commission created by this Act shall have the power and authority to make an award of reasonable compensation for any serious bodily disfigurement received by any employee within the meaning of this Act, not to exceed $2,500.00.

Dorsett, Commissioner, in *Henninger v. State of North Carolina,* volume 1 O. N. I. C., held that facial and head disfigurement to be compensable, "should be serious, and to be deemed serious must not be trifling, but such as to more or less affect the employee's ability to procure employment at such an occupation to which he has been accustomed to follow or make the employee more or less repulsive to the public, and as more or less unsightly in the eyes of his fellow men."

Allen, Chairman, in *Poston v. American Enka Corporation,* 1 O. N. I. C., 53, cited *Henninger v. State* in deciding a facial and head disfigurement case. In *Wilkinson v. Marion Veneer and Panel Company,* 1 O. N. I. C., 93, Allen, Chairman, held that "disfigurement of the hand and neck of the claimant are permanent and that they will tend to make him repulsive to other people and that they will affect his reëmployment if he shall seek employment from any person other than his present employer."

In *Porter v. Jennings Cotton Mills,* 1 O. N. I. C., 218, where plaintiff lost a testicle, Chairman Allen held that "without such loss of earning capacity there is no provision in the North Carolina Act for compensation, although permanent physical injury may have been suffered."

Dorsett, Commissioner, in *Warring v. Walker & Son* held that the plaintiff had "sustained no serious disfigurement because of loss of a testicle" and "that he has no permanent partial disability."

Neither of the above cases was appealed to the full Commission. The plaintiff in *Porter v. Cotton Mills* seeking redress at common law, plaintiff Warring appealed his case direct to Superior Court. H. Hoyle Sink, presiding Judge, remanded the case to the Industrial Commission and ordered that compensation be awarded for serious bodily disfigurement. Judge Sink finds that, "The loss of a testicle is a serious bodily disfigurement which holds the injured party up to scorn and ridicule in the eyes of his fellow men," and "further finds as a matter of law that an award should be made for a serious bodily disfigurement even though there is no apparent impairment of earning capacity, and that the question of earning capacity is not controlling in case of a serious bodily disfigurement under said Act." This case has been appealed to the Supreme Court.

Webster's Dictionary says "disfigurement," "that which disfigures," "a defacing, a blot." The same dictionary says "disfigurement means to mar the figure of, to render less complete, or beautiful in appearance, to deface or deform."

Dr. Jones, who treated the plaintiff, testified that the plaintiff "has a bodily deformity."

In *Hercules Powder Company v. Morris County Court,* New Jersey, 93, L, 107 Atl., Judge Minturn, writing to the subject of loss of a testicle, says "Certain it is that in a State of human excellence man has been, in English Literature, termed 'The paragon of animals,' and one cannot doubt that in our social environment permitted by the atmosphere of the classics or the Renaissance, the defendant would be debarred as a figure for the discriminating chisel of Phidias, the heroic pen of Horace, or the exacting brush of a Michelangelo."

In *Hercules Powder Company v. Morris County Court, Supra,* the Court, in speaking to the subject of loss of testicle "where any physical function is permanently impaired," said "whatever view medical experts may entertain upon that phase of the case, the indisputable fact remains that the injured defendant has suffered the loss of a portion of his anatomy, which nature implanted in the human organism as a dual reservoir of complete efficiency equally with eyes, ears, and limbs, and that to deprive one of these natural attributes is to take from him a component portion of the perfect *genus homo*, and to that extent at least impair the physical attributes of his manhood. This impairment may not prove to be so conspicuous in the ability to produce wages in the industrial world, but there are other spheres for the employment for human energy, talents and the possession of physical attributes besides the industrial world into the activity of which the defendant is entitled to bring, possess and enjoy all the physical attributes with which nature endowed him."

In *Kostida v. Department of Labor and Industry*, Wash., 1926, code 247, page 1014, compensation was allowed for the loss of a testicle upon a clause in the Compensation Law of the State of Washington which reads as follows: "or any other injury known in surgery to be permanent partial disability."

The Legislature provided in Section 31 (t), for serious bodily disfigurement. It does not say that this disfigurement must be visible. In the usual business and social pursuits of man he only exposes both hands and a part of the neck. Certainly, if the Legislature had intended to provide only for visible bodily disfigurement it would have been explicit.

Therefore, we consider the physical status of the injured as lessened by the loss of a physical attribute, which serves to constitute the perfect *genus homo*, or as possessed of a dual entity which in natural and moral law he had a right to retain as a reserve factor in the cosmic dispensation, the loss he sustained was a serious and permanent bodily disfigurement of his physical entity under the provision of Section 31 (t).

The Legislature left the realm of "pure and unadulterated compensation" when it inserted the disfigurement clause and said there is a recovery under the Compensation Act for injuries other than those involving loss of earning power. In Northeastern, page 221, volume 125: "The loss of his capacity to earn . . . is the basis upon which his compensation should be based. *Gillen v. Ocean, etc., Corp.*, 215 Mass., 96; 102 N. E. 346; L. R. A., 1916A, 371. 'The theory of the New York law is not indemnity for loss of a member or physical impairment as such, but compensation for disability to work.' *Marhoffer v. Marhoffer*, 220 N. Y., 543; 116 N. C. 379. 'Compensation is not allowed for pain and discomfort following injury, but only for disability to labor.' *Kid v. N. Y., etc., Co.*, 1 Cal., I. A. C. December 475."

In making the award for serious bodily disfigurement the Commission is taking into consideration the age of the plaintiff who was 64 years old the 12th day of January, 1930.

Upon the question of permanent total disability the Commission is ordering the plaintiff to Raleigh to be examined by the Commission's medical department for determination of this question.

Award

The Commission awards compensation to the plaintiff for temporary total disability from September 23, 1929, to December 31, 1929, at $12.00 (60 per cent of $21.00) per week. For serious bodily disfigurement the Commission awards the plaintiff compensation at the rate of $10.00 per week for sixty weeks, and in addition thereto the defendants shall pay to the proper parties all necessary medical, surgical and hospital costs. The plaintiff is ordered to Raleigh at the expense of the carrier for physical examination to determine if he has permanent and total disability and the condition of the right testicle.

The defendants will pay the costs in this hearing.

[Docket No. 457]

S. M. HILLIARD, Employee, Plaintiff, v. CAROLINA STEEL AND IRON COMPANY, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed June 18, 1930

Hernia.—Potential hernia not recognized but where five requirements are met, operation and compensation allowed.

Reversed on Review.—Where evidence shows hernia. Met five requirements hearing Commissioner's opinion denying compensation is reversed.

This case came on for review before the full Commission at Raleigh, N. C., on May 31, 1930, from an opinion by Dorsett, Commissioner, subsequent to the original hearing at Greensboro, N. C., May 16, 1930.

Neither party was represented at the hearing.

Opinion by Wilson, Commissioner.

Statement of the Case

The defendants admit that the plaintiff was regularly employed at the time of the alleged accident at the average weekly wage of thirty dollars. The defendants, however, denied liability in this case, contending that the requirements of Section 2 (r) of the Act have not been met.

Plaintiff testified that while loading an electric welder, weighing about fifteen hundred pounds, on February 3, 1930, he strained himself, causing a hernia, when he used a pole to raise the welder to permit another man to hold the wheels under it. The wheels had stuck so that it would not roll. He said that he felt a stinging or burning immediately in his left side. He then told a man at the plant that he felt "funny down there," that he felt a swelling that night, and the next day it was swollen and hurting. Plaintiff said he did not have a hernia prior to the accident.

Upon all the evidence in this case the full Commission makes the following

Findings of Fact

1. That both parties have accepted the provisions of the Compensation Act, and the Maryland Casualty Company is the intervening party.
2. That plaintiff sustained a personal injury by accident on February 3, 1930, while raising an electric welder weighing approximately fifteen hundred pounds, resulting in a left inguinal hernia; that the hernia fulfills the requirements of Section 2 (r); that the plaintiff has not lost any time from work to date.
3. That plaintiff's average weekly wage was $38.00.

Conclusions of Law

To determine the compensability of an alleged hernia is one of the most perplexing problems presented to the Commission because there are two types, congenital and traumatic. There are two "schools of thought" in the medical profession,—those who believe all hernias are congenital and those who believe that there are traumatic and congenital hernias. The North Carolina Compensation Law recognizes one class of hernia as traumatic and lays down five requirements in Section 2 (r) to be fulfilled. These requirements are:

1. That there was an injury resulting in hernia or rupture.
2. That the hernia or rupture appeared suddenly.
3. That it was accompanied by pain.
4. That the hernia or rupture immedately followed an accident.
5. That the hernia or rupture did not exist prior to the accident for which compensation is claimed.

In the above styled case the doctor testified that he "told him (the plaintiff) he had a rupture," and the plaintiff asked the doctor if the accident described caused the hernia, and the doctor said he could not tell about that at all; that usually hernias are congenital, and not due primarily to the accident, but similarly the accident precipitated a pushing down of the fecal of the gut in that canal.

The doctor further testified that he had told plaintiff that he had a "congenital defect or weakness of the ring"; that plaintiff "would suffer intense pain if you had no defect there before, because you have to make the tissue give way to an extent that would be like tearing," but that "due to the fact that" the plaintiff "said the pain was not so severe" the doctor thought the hernia was result of a "congenital defect."

In *Puritan Bed Spring Company v. Wolfe* (1928) 68 Ind. App., 330, 120 Northeastern 417, the Court adopted what was stated to be the view favored by the weight of authority, and said: "The mere fact that appellee's condition made him more susceptible to the particular injury which resulted in his disability furnishes no ground for holding that the disease or condition, rather than the accident, was the proximate cause of the injury upon which the allowance for disability is based. We recognize that there is a line of compensation cases in other jurisdictions which give to the word 'accident' used in the respective compensation acts, a restricted meaning which in a measure justifies appellant's contention; but the weight of authority and the better reason, we think, favor the adoption of the popular meaning of said word, which includes "any un-looked-for mishap or untoward event not expected or designed." See also *Robbins v. Original Gas Engineering Company* (1916) 191 Mich., 122; 157 N. W. 437, and *Bell v. Hayes-Ionia Co.* (1916) 192 Mich., 90; 158 N. W. 179; *Hurley v. Selden-Breck Construction Co.* (1916) 193 Mich., 197; 159 N. W., 311; *Brown v. Kemp* (1913) 6 B. W. C. C. (Eng.) 725; and *Fulford v. Northfleet Coal and Ballast Co.* (1907) 1 B. W. C. C. (Eng.), 222.

The North Carolina Law says that if the injury results in a hernia appearing suddenly, accompanied by pain, following an accident, and it did not exist prior to the accident, it is compensable.

There is no reference to a potential hernia. It is common knowledge in the medical profession that almost every man has a ring or potential hernia, and that some rings are more relaxed than others. The medical dictionary says there is no hernia until there is a protrusion.

A mere weakness is no bar to recovery. *Casper Cone Company v. Industrial Commission* (1917), 165 Wisc., 255; L. R. A., 117 E. 504; 161 Northwestern 784.

The full Commission holds that the hearing Commissioner was in error in denying an operation and compensation to plaintiff in accordance with Section 2 (r).

Award

The full Commission awards the plaintiff a radical operation to cure the left inguinal hernia under Section 2 (r), including all necessary medical, surgical, and hospital costs, as provided for in Section 25, and compensation at the rate of $18.00 (the maximum) per week for the period of temporary total disability resulting from the operation.

The defendants will pay the costs of this hearing.

[Docket No. 498]

JOSEPH FENTON PEOPLES, Employee, Plaintiff, v. WARRENTON BOX AND LUMBER COMPANY, Employer, MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed June 18, 1930

Horse Play.—Where employee had been engaged in play but had abandoned it at time of being injured by fellow employee claim for Compensation allowed.

Hearing before John C. Root, Deputy Commissioner, at Warrenton, N. C., June 2, 1930.

Plaintiff appeared in person.

Defendants represented by *S. Warren Bailey*, Adjuster, Maryland Casualty Company.

Opinion by Wilson, Commissioner.

This case was heard by John C. Root, Deputy Commissioner of the North Carolina Industrial Commission, on June 2, 1930 at Warrenton, N. C. The testimony of the witnesses was stenographically reported, certified to by the Deputy Commissioner, and transmitted to the Commission for determination and award in the manner required by the North Carolina Workmen's Compensation Act.

It was admitted that the average weekly wage of the plaintiff, Joseph Fenton Peoples, at the time of his injury, was $4.50 and that the plaintiff, on August 22, 1929, sustained an injury by accident. The only matter in issue was whether or not the injury arose out of and in the course of the employment, as is required in order to entitle the plaintiff to compensation. The defendant carrier, Maryland Casualty Company, contended that the injury resulted from plaintiff having indulged in what is commonly known as "horse play" and that therefore the plaintiff was not entitled to recover. The plaintiff and a fellow-employee, James Pearce, boys in their early teens, had, on the day of the injury, been playing. They had been playing not more than ten or fifteen minutes prior to the time the accident occurred. They were on good terms with each other. They were accustomed to playing during working hours, as were other boys working for the employer, notwithstanding Mr. W. W. Cawthorne, Bookkeeper and Accountant for the employer, testified as follows: "We do not allow them to play during working hours." When asked what penalty was imposed for playing Mr. Cawthorne replied: "I do not think we have charged any of them up for playing, but we threatened to several times." However, there was no evidence to the effect that the plaintiff or James Pearce had been previously threatened with a penalty for playing. In fact, James Pearce testified that he had never been requested not to play during working hours. It does not appear from the evidence just what the penalty would have been had the rule against playing been enforced. From all the evidence the Commissioner makes the following

Findings of Fact

1. That the plaintiff and James Pearce had been playing during working hours, ten or fifteen minutes prior to the time of plaintiff's injury, which injury occurred about 3:30 or 4:00 o'clock in the afternoon of Thursday, August 22, 1929; that plaintiff's duties required him to pump and carry water; that he was pumping water when he saw James Pearce come upon the platform where plaintiff was pumping; that plaintiff spoke to James Pearce; that when the plaintiff saw James Pearce coming towards him he picked up a bucket of water he had just pumped and ran with it; that James Pearce threw a planer blade, which struck plaintiff on the right knee.

2. That Dr. G. H. Macon was first called to treat the plaintiff for his injuries and that after a few days Dr. Macon referred the plaintiff to Dr. Thomas S. Royster of Henderson, N. C., for further treatment; that when the plaintiff was first examined by Dr. Royster he was found to have acute arthritis of the right knee joint, a skin puncture as from some instrument; the petella wounded, the knee swollen, flexed, red and tender; that Dr. Royster kept the plaintiff in the hospital until September 2, 1929, on which date he referred the plaintiff back to Dr. Macon, thinking plaintiff would need no further hospitalization; that when plaintiff returned to Dr. Macon for treatment he had considerable stiffness in the knee. It is not certain now whether or not plaintiff will suffer any loss of use of the injured leg as a result of his injury; that plaintiff returned to work November 24, 1929, but still has some pain in the injured leg, notwithstanding he has had improved motion since returning to work.

Conclusions of Law

1. Not every injury by accident occurring on the premises of the employer during working hours is compensable. This Commission has heretofore held that an employee may temporarily abandon or step aside from his employment and receive injuries for which he is not entitled to the benefits provided by the Workmen's Compensation Act. *Graham Piercy v. Henrietta Mills,* O. N. C. I. C., Vol. 1, p. 314, and *James Smith v. Neuse Veneer & Box Company,* O. N. C. I. C., Vol. 1, p. 317. Also this Commission has held in the case of *R. M. Starnes v. Flint Manufacturing Company,* O. N. C. I. C., Vol. 1, p. 239, that where the plaintiff, at the time of his injury, was engaged in horse play, the injury is not compensable. On the other hand, in the case of *Ormond E. Chambers v. Union Oil Company, Inc.,* O. N. C. I. C., Vol. 1, p. 221, compensation was awarded where the plaintiff himself, not participating in play, was injured as a result of sportive conduct on the part of a fellow workman. In the case cited Allen, Chairman, quoted from the decision of the New York Court of Appeals, in the case of *Lennbrens v. Champlain Silk Mills,* 128 N. E., 711, as follows: "That it (the accident) arose in the course of employment is unquestioned; that it arose out of the employment is now held. The claimant's presence in a factory in association with other workmen involves exposure to the risk of injury from the careless acts of those about him. He was brought, by the condition of his work, within the zone of danger. Whatever men and boys will do when gathered together in such surroundings at all events, if it is something reasonably to be expected, was one of the perils of the service. For workmen of that age, or even maturer years, to engage in a moments diversion from work to joke with or play a prank upon a fellow workman, is a matter of common knowledge. The claimant was injured not merely while he was in a factory but *because* he was in a factory, in touch with associations and conditions inseparable from factory life. The risks of such associations and conditions are risks of the employment."

2. From the evidence it has been found that the plaintiff was in the performance of his duty, pumping water, when he saw James Pearce approaching, with the planer blade in his hand. The Commissioner, therefore, finds,

as a matter of law, that notwithstanding the plaintiff had previously been playing, he had abandoned play and was actually at work when he had reason to believe he might expect some further sportive act on the part of James Pearce. It is significant that the plaintiff picked up the bucket of water and ran with it toward the mill. The Commissioner is of the opinion that the mere fact that plaintiff ran with the water, when his work did not require that he should run, is not material. There was no evidence indicating that running while carrying water was forbidden. Certainly it was not contended that having run with the water, instead of walking with it, accounted for plaintiff's injury. Obviously, it was but natural, under the circumstances, for the plaintiff, a mere lad, to run. Plaintiff's injuries resulted from an accident arising out of and in the course of his employment.

Award

It is, therefore, ordered that the defendants pay to the plaintiff compensation at the rate of $7.00 per week, the minimum prescribed by the Act, for a period of 13 1/7 weeks, covering plaintiff's temporary total disability which began August 22, 1929, and continued through November 21, 1929; that the defendants also pay the reasonable value of all medical and hospital services heretofore rendered, when bills therefore shall have been approved by the Industrial Commission, including the sum of $10.00 to Dr. G. H. Macon and $15.72 to Dr. Thomas S. Royster for attendance at the hearing. It is further ordered that three months from the date of notice of this award the defendants have plaintiff reëxamined by Dr. Thomas S. Royster for the purpose of determining the extent of any permanent loss of use which the plaintiff may have sustained as a result of his injury.

[Docket No. 531]

DONNIE LEE HONEYCUTT, Employee, Plaintiff, v. VANN MOTOR COMPANY, Employer, and EMPLOYERS' LIABILITY ASSURANCE CORPORATION, Carrier, Defendants

Filed June 20, 1930

ABANDONMENT OF EMPLOYMENT.—Where employee abandons employment to indulge in roller skating, claim denied.

Hearing before WILSON, Commissioner, at Clinton, N. C., May 14, 1930.

Plaintiff appeared in person.

Defendants represented by *A. B. Dreher*, Attorney Adjuster, Greensboro, N. C.

Opinion by WILSON, Commissioner.

Statement of the Case

It was admitted in open court that the Employers' Liability Assurance Corporation was the Carrier for the Vann Motor Company, and that Miss Donnie Lee Honeycutt was a regular employee of said company at an average weekly wage of twenty dollars. It is further admitted that the plaintiff sustained an accident on February 22, 1930, at about 12:02 p.m. and that said accident resulted in a simple break of the tibia of the left leg at the junction of the lower and middle thirds, oblique and complete. The fibula was broken just below this point, the line of fracture dividing and making a wedged shaped fragment. Four inches higher there was also a break. It is admitted that the plaintiff has been temporarily and totally disabled since date of the break, and is not able to return to work. The carrier admits that the accident arose in the course of her regular employment, but denies that the accident arose out of the employment.

The accidental injury, before admitted, was result of plaintiff putting on roller skates while engaged in her regular employment with the Vann Motor Company, about forty minutes after she put on the skates she fell because of the use of the skates, and broke her left leg.

No evidence was submitted to show that the skates were necessary in the plaintiff's employment as bookkeeper and office clerk for said company. In fact, there was a fad in the local community for skating, and Miss Honeycutt testified that she had purchased the skates the day before, and intended learning to skate.

Upon the evidence in this case the Commission makes the following

Findings of Fact

1. That both parties had accepted the provisions of the Workmen's Compensation Act.

2. That the plaintiff's accidental injury on February 22, 1930, as result of falling and breaking her left leg while wearing roller skates, as direct result of their use, did not arise out of her employment, even though it was in the course of her employment.

3. That plaintiff has been temporarily and totally disabled from date of accident, February 22, 1930, and at the time of the hearing was still temporarily disabled; that the average weekly wage was twenty dollars; that no medical and hospital bills have been paid by the defendants.

Because there was no evidence offered to show that the use of roller skates was in any way incidental to the employment of plaintiff by the Vann Motor Company, this case is dismissed.

Each party will pay its own costs.

[Docket No. 649]

JOHN BROTHERS, Plaintiff, v. PASQUOTANK LOGGING COMPANY, Employer, and LUMBERMANS MUTUAL CASUALTY COMPANY, Carrier, Defendants

Filed June 26, 1930

Burden of Proof.—Where employer proves termination of disability burden is upon Claimant to establish reoccurrence of disability from same injury.

Opinion by Dorsett, Commissioner.

This case was heard at Elizabeth City, N. C., June 3, 1930, by Deputy Commissioner John C. Root. It was stenographically recorded and transmitted to the Commission for its determination and award in the manner required by Section 58 of the North Carolina Workmen's Compensation Act. It was admitted that on July 15, 1929, the plaintiff, John Brothers, received certain injuries by accident arising out of and in the course of his employment, and that at the time of the accident the plaintiff's average weekly wage was $12.15. The questions for determination at the hearing were: (1) Has temporary total disability terminated, and if so, when? (2) Has the plaintiff sustained any permanent loss of use of his injured leg, and if so, to what extent?

Statement of the Case

On July 15, 1929, the plaintiff was loading logs for his employer when he was accidentally injured by being struck by a log. Plaintiff's injury consisted of a complete fracture of both bones in the left leg between the ankle and the knee. Immediately following his injury the plaintiff was carried by Mr. W. L. Jones, the defendant's manager, to Dr. Howard Combs for treatment. Dr. Combs X-rayed the injured leg, applied a splint, and after a week placed the leg in a cast. Plaintiff was kept in the hospital for about three weeks and then sent home. A second cast was applied and a Wasserman test was made, which did not indicate any systemic trouble. Dr. Combs experienced difficulty in prevailing upon the plaintiff to lay aside his crutches and give the injured leg the exercise required in order to make the best recovery. Dr. Combs had authority from the defendant insurance carrier to treat the plaintiff until there had been a complete recovery. The plaintiff alleged that after Dr. Combs discharged him, he suffered pain and went to Dr. Combs for further treatment, which was refused. That was denied by Dr. Combs. At the time he discharged the plaintiff on April 10, 1930, Dr. Combs found no limitation of motion in the injured leg and directed the plaintiff to go back to work. That was eight weeks after the last cast was removed. The plaintiff promised the doctor on April 10 that he would return to work. Dr. Combs at that time was of the opinion that the plaintiff was able to do the same work he had been doing prior to the injury. The plaintiff testified that he is unable to walk without the use of a crutch for a distance of more than two or three steps, and that he is now receiving treatment in St. Vincent's Hospital in Norfolk, Virginia, by Dr. L. A. Huff. The plaintiff was unable to describe the kind of treatment given by Dr. Huff and when asked if Dr. Huff or anyone else in Norfolk made an X-ray picture of his leg, replied: "They did so much that I can't remember." The plaintiff paid some one at the hospital in Norfolk the sum of five cents. It would seem that the plaintiff must have gone to some clinic, as he was referred, according to his own testimony, to two or three doctors before having been finally placed in the care of Dr. Huff. The plaintiff introduced a memorandum dated May 2, 1930, signed as follows: "L. A. Huff, M.D., St. Vincent's Hospital." The memorandum read as follows: "This is to certify that John Brothers is still having surgical attention to his broken leg and is in no condition to go to work." This memorandum was introduced and admitted as hearsay evidence, as the memorandum was not in the form of a deposition and its authenticity was not proven. The defendants objected to the admission of the memorandum as hearsay evidence and upon being over-ruled by the Deputy Commissioner took an exception.

From all the evidence the Commissioner makes the following

Findings of Fact

1. That the plaintiff has been paid compensation for a period of thirty-three weeks from July 15, 1929, to and including March 30, 1930, at the rate of $7.29 per week.

2. That on April 10, 1930, plaintiff's injury had completely healed and that plaintiff was able to return to work.

3. That the defendants procured proper medical treatment for the plaintiff and have not at any time refused to furnish necessary treatment.

4. That if the plaintiff is now disabled, he has not sustained the burden resting upon him of proving that such disability is a result of injuries received July 15, 1929.

5. That plaintiff's injured leg is about one-half inch shorter than his right leg, the shortage having resulted from the injury and that the plaintiff has therefore sustained five per cent permanent loss of the use of the injured leg.

Conclusions of Law

1. The burden is always upon the plaintiff in the first place to prove that his disability is the result of an accident and that the accident arose out of and in the course of his employment. At the hearing of this case the plaintiff was relieved of this burden, the defendants having admitted that the plaintiff sustained a compensable injury. The defendants then proved that the plaintiff's disability terminated April 10, 1930. Giving the plaintiff the benefit of every reasonable doubt raised by the evidence, the only claim he could now make is that he has suffered a recurrence of disability. Where a recurrence of disability is shown (and we have not found that the plaintiff in this case proved a present disability) the plaintiff must further show that such recurrence is due to the original injury to entitle him to additional compensation. Having failed to prove any present disability and

to show the cause of any such disability, and having been unable to describe the treatment as alleged to have been given by Dr. Huff, the Commissioner cannot at this time award compensation for the alleged disability.

2. The Deputy Commissioner did not commit error in permitting the introduction of the memorandum hereinbefore referred to as hearsay evidence.

Award

It is therefore ordered that an award issue directing the defendants to pay to the plaintiff compensation for temporary total disability at the rate of $7.29 per week from July 15, 1929, to and including April 10, 1930, the defendants to take credit for compensation heretofore paid; also, that the defendants pay to the plaintiff compensation at the rate of $7.29 per week for eight and three-fourths weeks, beginning from April 10, 1930, for plaintiff's permanent injury, which consists of five per cent loss of use of his left leg; that the defendants pay to the proper person or persons the reasonable value of all medical and hospital treatment given prior to April 11, 1930, when bills therefor have been approved by the Industrial Commission. It is further ordered that with respect to the costs of this proceeding, each party will pay its own.

[Docket No. 640]

W. W. CANTER, Deceased, Employee, Plaintiff, v. SURRY COUNTY BOARD OF EDUCATION, Employer, MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed June 30, 1930

SHOTGUN INJURY.—Where injury is a result of wound inflicted while employee is preparing to hunt squirrels and not connected with his duty, claim denied.

Hearing was held before DORSETT, Commissioner, at Mount Airy N. C., on June 19, 1930.

Plaintiff represented by *Folger & Folger*, Attorneys, Mount Airy.
Defendants represented by *L. B. Carpenter*, Adjuster.

Opinion by DORSETT, Commissioner.

Statement of the Case

The claimants in the instant case are the wife and minor children of W. W. Canter, deceased. They are asking for compensation for the death of husband and father, contending that while regularly employed by the Surry County Board of Education, and while in the performance of duty as fireman, janitor and general guardian of the property of the school board, that he suffered an accident which arose out of and in the course of his employment and resulting in his death. The defendants admit that the deceased was a regular employee of the Surry County Board of Education at a monthly salary of $40.00 to work six months a year. The defendants further admit that the deceased, at the time of his death, left dependent upon him for support, a wife and four minor children between the ages of six and seventeen. The defendants further admit that these dependents, at the time of the death of the deceased, were wholly dependent upon the earnings of the deceased for support. The defendants are denying liability in this case on the sole ground that the accident causing the death did not arise out of and in the course of the deceased's employment.

The facts in this case are not in dispute and from the evidence are as follows:

Findings of Fact

1. The parties of this proceeding are bound by the provisions of the North Carolina Workmen's Compensation Act of 1929, and the Maryland Casualty Company is the insurance carrier.
2. The deceased died as a result of a gunshot wound caused when a shotgun accidently "went off," the load entering the body around the hip of the deceased.
3. The deceased, at the time of his death, was employed as a fireman, janitor and general custodian of the property of the defendant employer.
4. The deceased, with a shotgun which he was carrying for the purpose of killing a squirrel, started in the basement of the school building to attend to the fire, the gun accidently discharged wounding the deceased resulting in his death.
5. The accident suffered did not arise out of and in the course of the deceased's employment.
6. At the time of the accident the average monthly salary of the deceased was $40.00.
7. The deceased left wholly dependent upon him his wife and four minor children.

Upon the foregoing findings of fact are based the following

Conclusions of Law

The defendants in the instant case deny liability on the sole ground that the accident resulting in the death of the deceased did not arise out of and in the course of employment. The burden of proof is upon the claimants to prove by certainly a greater weight of the evidence that the deceased suffered an accident that arose out of and in the course of his employment in order to be awarded compensation. We do not believe in the instant case the claimants have sustained this burden of proof. The accident, in all likelihood, would happen in the course of the deceased's employment, but we can't see that it arose out of his employment and the law provides that an accident must not only arise in the course of the employee's employment, but it must arise out of it. The courts of the country have on several different occasions attempted to define just what is meant by arising out of and in the course of employment. The best definition we have been able to find is stated in McNicols Case, 215 Mass., 497; 102 N. E. 697; L. R. A. 1916 A, 306. The court in that case says:

"An injury may be said to arise out of the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a casual connection between the condition under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it "arises out of" the employment, but it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

We cannot find that the injury suffered by the deceased in the instant case had its origin in a risk connected with his job. The evidence from the doctor who attended the deceased prior to his death, and the only person we have any record of who talked with the deceased, was that the deceased told him that he had seen a squirrel in the woods nearby and decided to kill the squirrel. We believe that the deceased in this case was carrying the shotgun for the purpose of killing the squirrel rather than as custodian of the property of his master. The counsel for the claimants objected strenuously to the doctor's testifying on the grounds that such testimony was privileged as between patient and physician. We find, however, in Section 27 of the Compensation Act these words: "No fact communicated to or otherwise learned by any physician or surgeon who may have attended or examined the employee, or who may have been present at any examination, shall be privileged, either in hearings provided for by this act or any action at law brought to recover damages against any employer who may have accepted the compensation provisions of this act."

Not yet have we reached the place where a worker is entitled to any compensation for any accident which might happen to him at any time or place just because he was working on a certain employment for some employer. We still have accidents in the employments and accidents which are the workman's own risk and therefore a line has been drawn as to time and place of accidents and our law has provided the limitations that accidents must arise out of and in the course of the employee's employment to entitle him to have a right to recover compensation.

"An injury occurs in the course of employment within the meaning of the compensation act when it occurs within the period of employment, at a place where the employee may reasonably be, and while he is reasonably fulfilling the duties of his employment, or is engaged in doing something incidental to it." *Granite, Sand and Gravel Co. v. Willoughby* (Indiana), 123, N. E., 194.

Some states have laws that only require injuries to occur in the course of employment and do not contain the words "arise out of." In our law, however, the accident must not only arise in the course of employment, but it must arise out of it. A casual connection must be pressed. The job the worker was employed to do must in some way be responsible for the injury before compensation can be allowed.

We do not believe that the claimants have met the burden of proof that the accident arose out of and in the course of employment, and when the claimants fail to sustain this burden compensation must be denied and it is so ordered. Concerning the cost of this hearing, each side will take care of its own.

[Docket No. 394]

J. S. BROWN, Employee, Plaintiff, v. TOMLINSON CHAIR MANUFACTURING COMPANY, Employer, LIBERTY MUTUAL INSURANCE COMPANY, Carrier, Defendants

Filed June 30, 1930

BURDEN OF PROOF.—Where accidental injury is admitted, burden is upon employer to prove termination of disability.

PERMANENT TOTAL DISABILITY.—Where injury results in traumatic neurosis and evidence shows no cure can be made, compensation allowed for permanent total disability.

Hearing was held before DORSETT, Commissioner, at High Point, N. C., on June 16, 1930.

Plaintiff represented by *Lyon & Evans*, Attorneys, Mr. Evans, Appearing, and by the law firm of *Austin & Turner*, Mr. Turner appearing.

Defendants represented by *Smith & Joyner*, Attorneys, Mr. Brady of that firm appearing and *J. B. Everett*, Adjuster for the Carrier.

Opinion by DORSETT, Commissioner.

Statement of the Case

The file in the instant case contains an agreement dated August 20, 1929, for the payment of compensation for temporary total disability, approved by the Commission on Februray 4, 1930. On February 26, 1930, the Carrier requested the Commission to discontinue the payment of compensation which was denied in that there was no supporting information from the doctor showing that the claimant was able to return to work. The defendants contend that the plaintiff is suffering from traumatic neurosis. A hearing was requested by the claimant on the grounds that he had not been furnished medical aid since December following his accident and that he was still disabled contending that the accident resulted in an injury to his head.

The plaintiff in the instant case was injured when a chair, weighing thirteen pounds dropped some dozen feet from the second story through a trap door in the factory where the claimant was at work, striking the claimant on the head. It will be noted that the defendants did not deny liability in this case but entered into an agreement and have paid compensation for several months. The only question at issue at this time is whether or not disability has terminated and if so when did it terminate. There is another issue concerning the matter of any permanent disability suffered by the plaintiff.

Two hearings have been had in this case. The first on April 2, 1930 and after the testimony of the attending physician had been heard the Commissioner decided that the best course to pursue in the case was to direct that the defendant furnish the plaintiff with medical treatment for thirty days and asked the attending physician, employed by the defendants, to keep the plaintiff under observation. The Commissioner also decided that a physician selected by the plaintiff should attend and observe the plaintiff during the thirty-day period. At the end of such period another hearing to be had and the case decided. The defendants furnished to the plaintiff the additional treatment as per the suggestion of the Commissioner and kept the plaintiff under observation for that period of time. A physician selected by the plaintiff himself also attended him and observed him during that period.

A second hearing was had in this matter on June 16, 1930, in the city of High Point. The record in the case is quite voluminous but the medical testimony in the opinion of the Commissioner, is to the effect that the plaintiff is permanently injured; that he is totally disabled as a result of the accident he suffered while regularly employed by the Tomlinson Chair Company. Upon all the evidence the Commissioner makes the following

Findings of Fact

1. The parties to this proceeding are bound by the provisions of the North Carolina Workmen's Compensation Act of 1929. The Liberty Mutual Insurance Company has intervened as a party defendant as the insurance carrier.

2. The agreement entered into by the parties to this proceeding under date of August 20, 1929, represents the true facts concerning the occurrence of the accident and the average weekly wage.

3. The plaintiff has been totally disabled since the date of the accident and has not been able to work at any employment.

4. As a result of the accident the plaintiff has been permanently and totally disabled, from the injury received and resulting in a condition known as traumatic neurosis.

Upon the foregoing findings of fact are based the following

Conclusions of Law

At the very outset in this hearing the Commissioner ruled that since the defendants had admitted liability after the plaintiff suffered his accident and had entered into an agreement to pay compensation during the period of temporary total disability that the burden of proof was upon the defendants to show that this period of temporary total disability had terminated since the defendants requested permission to stop the payments, contending that temporary total disability had terminated. The burden of proof in the instant case, in the opinion of the Commissioner, was on the defendants to show that the plaintiff was able to return to work and that the plaintiff had not received permanent injuries because of the accident suffered.

The period of temporary total disability had not terminated and upon the further finding that the plaintiff, because of his accident, sustained permanent total disability, the following award will be issued.

Award

The defendants are directed to pay to the plaintiff compensation, at the rate of $10.37 a week from the date of the accident for a period not to exceed four hundred weeks as provided by the law. The defendants are further directed to pay to the parties entitled to receive the same all hospital and medical bills incurred. Concerning the cost of the hearing, each side will pay its own.

[Docket No. 124]

JOHN PROPST, Deceased, Employee, Plaintiff, v. CITY OF HIGH POINT, Employer, HARTFORD ACCIDENT AND INDEMNITY COMPANY, Carrier, Defendants

Filed June 3, 1930

NOTICE OF OCCURRENCE OF ACCIDENT.—Where rights of employer not prejudiced by lack of notice Compensation will not be denied.

Hearing was held before DORSETT, Commissioner, at High Point, N. C., on June 9, 1930.

Plaintiff represented by *O. R. York* and *D. A. Walser*.
Defendants represented by *Mr. Taylor*, Adjuster.

Opinion for full Commission by DORSETT, Commissioner.

Statement of the Case

This case was set for review before the Full Commission on April 28, 1930, and upon the motion of the plaintiff the taking of additional evidence was permitted, to clarify a question not raised before the hearing Commissioner, and upon taking this additional evidence, and upon the motion by the defendants for the purpose of rebutting the newly discovered evidence of the plaintiff, the Full Commission directed that additional evidence be taken at High Point accordingly on June 9, 1930, before Dorsett, Commissioner, the additional evidence, including a retaking of the previous evidence, was introduced.

The Full Commission has reviewed all the evidence which tends to prove that on or about August 22, the deceased, while engaged in his work for the defendant, stepped upon a nail resulting in a puncture wound to his foot. This wound was not treated at any time except by the deceased. On August 24, the deceased was injured by a garbage can striking him on the chest. He immediately reported the latter accident to his superior, Mr. Shipplett, and medical attention was furnished by the employer. One week from that date of this injury the deceased was admitted in the hospital and placed under the care of Dr. Burrus. On the date Dr. Burrus first saw the injured he found him suffering with tetanus and was stiff as a board from the rigors of the disease. The morning after admission to the hospital, Dr. Burrus was given a history of the accident, including the injury by nail puncture. On the second day death ensued.

The record shows that the deceased left no dependents and that C. H. Williams has duly qualified as administrator of the deceased's estate.

Upon all the evidence taken in this case the Commission makes the following

Findings of Fact

1. That the deceased and the defendant City of High Point had accepted the provisions of the Workmen's Compensation Act, and that the city has insured its compensation liability with the Hartford Accident and Indemnity Company.

2. That while regularly employed by the City of High Point the deceased, on or about August 22, 1929, suffered an injury by sticking a nail in his foot, on August 24, 1929 suffered an injury in dumping a garbage can, both injuries being by accident that arose out of and in the course of his employment by the city.

3. That as a result of the injury by nail puncture the deceased contracted tetanus which naturally and unavoidably resulted from the accident, and on August 31, 1929, death ensued from tetanus.

4. That the deceased's average weekly wage was $15.15.

5. That the deceased left no dependents either wholly or partially dependent upon him at the time of the accident.

6. That C. H. Williams has duly qualified as administrator of the estate of the deceased.

7. That the defendant City of High Point, through its agent, Mr. G. R. Shipplett, and Dr. J. T. Burrus, had knowledge of the occurrence of both accidental injuries referred to above.

8. That no written notice was given of the occurrence of the two accidental injuries within thirty days after the occurrence of the two accidental injuries; that the lack of such notice has not prejudiced the rights of the employer, and that the personal representative required to give

such notice was not en esse within thirty days after the occurrence of the accident, and the deceased was within a week after the accident, mentally incompetent to give the notice.

Upon the foregoing findings of fact are based the following

Conclusions of Law

The defendant's only contentions are that the notice required by Section 22 of the Act was not given of the occurrence of the accident, and that there being no dependents, no compensation is paid. The evidence of Mr. Shipplett, foreman under whom the deceased worked, is that immediate notice was given him of the occurrence of the second accident which occurred either one or two days subsequent to the injury by the nail puncture. Medical attention was immedately provided, and thus within two days of the occurrence of both accidents, the deceased was in the care of the physician. For some unknown reason neither party has seen proper to show the knowledge the first two physicians who treated the deceased had of either accident. The first physician who treated the deceased was a colored doctor, then the services of one Dr. Jackson were procured, and finally within a week, Dr. Burrus was called in and he was the only one to testify and he had knowledge of both accidents. This knowledge of Dr. Burrus, as agent for the defendant, must be imputed to the defendants. The contention of lack of knowledge of the defendant of the occurrence of both accidents is not sustained.

The defendants further contend that no compensation is payable unless written notice is given within thirty days unless reasonable excuse is made. The Commission is satisfied that since the employer had the deceased under medical treatment within two days of the occurrence of both accidents, that its rights could not be prejudiced by lack of written notice within the thirty days.

The Commission in *Freeman v. Motor Company,* N. C. I. C. 324, has held that where there are no dependents the personal representative is entitled to the same compensation as persons wholly dependent, less the burial expenses. It is directed that there issue the following

Award

The defendants will pay in a lump sum to C. H. Williams, as personal representative of the deceased, the commuted amount, using 4 per cent discount table of 350 weekly installments at the weekly rate of $9.09, less the funeral expenses. The defendants will pay to the proper persons all medical and hospital expenses during the last illness of the deceased. The defendants will also pay the cost of these hearings conducted in this case.

An attorney's fee in the amount of $500.00 is approved and directed paid by the administrator to the attorneys of record for the claimant.

SUPREME COURT DECISIONS

ORMOND E. CHAMBERS *v.* UNION OIL COMPANY, Employer, and MARYLAND CASUALTY COMPANY, Carrier

North Carolina Supreme Court—No. 607D

Spring Term, 1930

Appeal from Buncombe County.

Lee & Lee for plaintiff; *J. M. Horner, Jr.*, for defendants.

Brogden, J.—Two questions of law are presented for decision:

1. Did the injury to plaintiff arise out of and in the course of the employment?

2. If the injury was the result of horse-play, is the plaintiff entitled to compensation?

The first question of law involves a construction of section 2 (f) of the Compensation Act. The section reads as follows: "Injury and personal injury shall mean only injury by accident arising out of and in the course of employment and shall not include disease in any form, except where it results naturally and unavoidably from the accident."

The record in the case at bar discloses that the plaintiff was injured while actually engaged in the proper performance of his work. Hence it must be conceded that the injury was sustained while he was "in the course of the employment." The term "arising out of the employment" is broad and comprehensive and perhaps not capable of precise definition. It must always be interpreted in the light of the facts and circumstances of the given case. Usually the courts have insisted that there must be some causal connection between the injury and the employment. However, the basic idea of the term is that the employment of workers in industry creates certain risks to which employees are subjected in the performance of their duties. It is apparent that the risk of one employment would differ from the risk of another employment, and, therefore, no iron rule of liability can be applied in all cases.

The Compensation Act does not apply to any industry employing less than five workmen, and hence the Act itself contemplates that successful industrial operation presumes the assembling of workers in one place who are engaged in various phases of the general prosecution of the business. It is a self-evident fact that men required to work in daily and intimate contact with other men are subjected to certain hazards by reason of the very contact itself because all men are not alike. Some are playful and full of fun; others are serious and diffident. Some are careless and reckless; others are painstaking and cautions. The assembling of such various types of mind and skill into one place must of necessity create and produce certain risks and hazards by virtue of the very employment itself. This idea was expressed by the Supreme Court of New Jersey in *Hulley v. Moosbrugger*, 93 Atlantic, 79. In that case the claimant went to his employer's shop to get certain pipe fitting when a fellow workman in a spirit of play swung his arm around either to knock off decedent's hat or strike him, whereupon the decedent in dodging the attack slipped on the descending concrete floor, fell and sutained injury which caused his death. The court said: "In the case under consideration, it appears that the prosecutor employed young men and boys. It is but natural to expect them to deport themselves as young men and boys, replete with the activities of life and health. For workmen of that age or even of maturer years to indulge in a moment's diversion from work to joke with or play a prank upon a fellow workman is a matter of common knowledge to every one who employs labor." While this case was reversed upon the ground that the injury "was a result of horse-play or sky-larking," the fact remains that the bulk of normal American workmen possess a stratum or residuum of vivacity and good nature which frequently manifests itself in joking and harmless pranks. These things are not unnatural, but natural and the ordinary outcropping of industrial contact between men of all classes and types. Such risks, therefore, are incident to the business and grow out of it. In an ordinary suit for damages for personal injury the workman assumes the ordinary risks of the business, but the Compensation Act in such case imposes the ordinary risk of the business upon the employer. That is to say, the employer and not the workman must assume the ordinary risks of the business or employment.

In the case at bar, the injured workman was attending to the duties of his employment. A fellow workman stepped aside for a moment to show him a pistol. The pistol had been carried habitually by the workman in order to protect his employer's property from robbery, and the employer testified: "I never said anything to my drivers about carrying weapons. . . . I will say that I thought they had them, but I had no definite knowledge of it. I knew of the fact that one of my drivers had been held up. He reported that to me." Certainly the testimony of the employer was some evidence of acquiescence in the habit of carrying weapons, indulged in by the drivers. Moreover, the Industrial Commission has found as a fact that the accident arose out of the employment, and there was evidence to support such finding. Hence under section 60 of the Compensation Act, the award of the Commission is "conclusive and binding as to all questions of fact."

The second question of law presented by the appeal involves the application of the so-called doctrine of "horse-play" or "sky-larking." This principle is based upon the idea that if a workman is injured while engaged in play, or for an instant steps out of the line of his regular duties to communicate with a fellow employee, he is not entitled to compensation, irrespective of whether he participated in the play or prank. The authorities bearing upon the subject are assembled in 13 A. L. R., 540; 20 A. L. R., 882; 36 A. L. R., 1469; 43 A. L. R., 492, and 46 A. L. R., 1150. The author of the annotation in 13 A. L. R., 540, says: "It is generally held that no compensation is recoverable under the Workmen's Compensation Acts, for injuries sustained through horse-play or fooling which was done independently of and disconnected from the performance of any duty of the employment, since such injuries do not arise out of the employment within the meaning of the acts." Numerous cases are cited from various jurisdictions in support of the principle of law so announced. In the same note the author continues the discussion as follows: "But in a number of cases an exception to the general rule has been recognized, and the right to compensation sustained, where an employee, who was injured through horse-play or fooling by other employees, took no part in the fooling, but was attending to his duties." Numerous cases are cited in support of this proposition.

A few of the cases illustrating the doctrine may not be amiss. For instance, in the case of *Leonbruno v. Champlain Silk Mills*, 128 N. E., 711, an employee, while engaged in the line of his duty, was struck in the eye by an apple thrown by a fellow servant engaged in horse-play. The Court of Appeals of New York held that the injury was compensable. In *Cassell v. U. S. Fidelity & Guaranty Co.*, 283 S. E., 127, the plaintiff was engaged in his regular duties as a stage hand. The stage manager came upon the scene and in fun snapped a pistol supposed to be unloaded, at other employees and at Cassell when the pistol fired and injured plaintiff. Pistols were kept for use during theatrical performances, but there was no practice of playing with pistols which had been acquiesced in by the employer. Upon such state of facts the Supreme Court of Texas held that the plaintiff was entitled to compensation.

Indeed, if a workman be denied compensation solely upon the ground that he was injured by the "sportive act" of a fellow workman, it would seem to be clear that the old "fellow servant" doctrine is appearing in a brand-new suit of legal clothes and parading through the law under the brand-new name of "horse-play."

It is generally conceded by all courts that the various compensation acts were intended to eliminate the fault of the workman as a basis for denying recovery. In other words, a workman is entitled to recover irrespective of fault if the injury arises out of and in the course of the employment. The doctrine of horse-play, which excludes a workman from compensation, although he is not at fault, and does not engage therein, is inconsistent with the underlying philosophy of compensation acts, which are designed for the very purpose of eliminating fault as a basis for determining liability.

We are therefore of the opinion and so hold: First, that the evidence discloses that the claimant sustained an injury arising out of and in the course of his employment. Second, that if he was injured as a result of horse-play, he did not participate therein; and, therefore, he is not precluded from recovery.

The judgment of the trial court is affirmed.

LEWIS H. JOHNSON *v.* ASHEVILLE HOSIERY COMPANY and MARYLAND CASUALTY COMPANY

North Carolina Supreme Court—No. 607C

Spring Term, 1930

Appeal from Buncombe County.

Lee & Lee for plaintiff; *J. C. Cheeseborough* for defendant.

Brogden, J.—Two questions of law are presented by the record.

1. Was the plaintiff an independent contractor and therefore not entitled to compensation?

2. Was the employment "both casual and not in the course of the trade, business, profession or occupation of his employer?"

Upon the facts appearing in the record, the first question of law must be answered in the negative. "An independent contractor has been defined as one who exercises an independent employment, contracts to do a piece of work according to his own judgment and methods and without being subject to his employer except as to the results of the work and who has the right to employ and direct the action of the workmen, independently of such employer and freed from any superior authority in him to say how the specified work shall be done or what the laborers shall do as it progresses." *Greer v. Construction Co.*, 190 N. C., 632; 130 S. E., 739. The principle thus announced is amply supported by the authorities assembled in the Greer case, *supra.*

In the case at bar the employer directed the progress of the work and reserved control of the plaintiff and other workmen. These facts exclude the theory of independent contractor.

The second question of law involves the construction of section 2 (b) of the Compensation Act. Said section undertakes to define the word employment and specifically excludes from the operation of the Act "persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer," etc. By virtue of the express terms of the statute, in order to exclude any employee, his employment must be casual, and in addition thereto, not in the course of the business of the employer. In other words, even if the employment be casual, the employee is not deprived of the benefits of the Act if the employment is in the course of the business of the employer. It is further provided in section 60 that the award of the Commission "shall be conclusive and binding as to all questions of fact." However, errors of law are reviewable.

It is generally held by the courts that the various Compensation Acts of the union should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation. Hence it is generally held that provisos excluding an employee from the broad and comprehensive definition of such term ought to be strictly construed in order that the predominating purposes of the act may be fully effectuated.

National Cast Iron Pipe Co. v. Hegginbotham, 112 Southern, 734; *Eddington v. Northwestern Bell Telephone Co.*, 202 N. W., 374.

Appellate Courts throughout the nation have adopted divergent views in interpreting the word "casual" and the words "course of the trade, business, profession or occupation of his employer." These views, however, are produced by the variable wording of given statutes. In some instances, if the employment is casual, the injured employee is not entitled to the benefits of the statute. In others, if the employment is not in the course of the employer's business, the injured employee is not entitled to the benefits of the statute. However, under the terms of our statute, in order to exclude an employee, the employment must be "both casual and not in the course of the trade, business," etc.

The Virginia Court in *Hoffer Bros. v. Smith*, 138 S. E., 474, said: "The test is the nature of the employment and not the nature of the contract. An employment cannot be said to be casual where it is in the usual course of the trade, business, or occupation of the employer. But it is casual when not permanent nor periodically regular, but occasional or by chance, and not in the usual course of the employer's trade or business." It has also been generally held that the kind of work done and not the duration of service is the determining factor. So that, if the work pertains to the business of the employer and is within the general scope of its purpose, the employment is not of a casual nature, although the hiring be for only a short period of time. *De Carli v. Business Warehouse Co.*, 140 Atl., 637. Thus it has been held that making repairs on a building owned by a creamery is within the usual course of the business of the employment, and, therefore, compensable. 167 N. W., 808; *Gross et al. v. Industrial Commission*, 167 N. W., 809. Furthermore it has been held that even though the employment is casual, the injury is compensable if occurring within the course of the employer's business. *Pershing v. Citizens Traction Co.*, 144 Atlantic, 97; *Hoshiko v. Industrial Commission*, 266 Pac., 1114; *Pfister v. Doon Electric Co.*, 202 N. W., 371.

In the case at bar the defendant was operating a factory for manufacturing hosiery and used machinery therein for such purpose. In order to facilitate the work and to render the machine room reasonably safe for operatives, it was necessary to perfect the lighting arrangement of the room. It was conceived that the painting of the ceiling of the room in white or a light color would add to the safety and facility of operation. The defendant, as an employer of labor, was bound in the exercise of reasonable care to furnish light for the operation of machinery. Whether he furnished the necessary light by means of electricity or by painting the ceiling, or both, was immaterial so far as plaintiff was concerned, if, as a matter of fact, at the time of his injury, he was engaged in an employment incident to the proper operation of the factory. An official of the defendant testified that he considered "painting the mill as incidental to operation," and, as such, it would be a part of the maintenance of the mill, the same as it is necessary to keep the roof repaired."

Even though it be conceded that the employment of the plaintiff was casual, he is not precluded from the benefits of the Compensation Act unless it should also appear that he was not engaged in the course of the trade, business, profession or occupation of his employer. The Industrial Commission found as a fact that the plaintiff was engaged in the course of the employer's business, and there is evidence in the record to support such finding. In such event, whether the Appellate Court agrees with the conclusion of the Commission or not, the finding of such fact is conclusive, by express declaration of the statute.

Moreover, the Higginbotham case, *supra*, is a direct authority for the award made by the Industrial Commission. In that case the defendant operated a large industrial plant and owned about 101 houses for the use of employees. It kept no regular force of painters but only repaired and painted as deterioration necessitated. The plaintiff was employed by the day and was injured as a result of the falling of a ladder upon which he was standing. The Alabama Compensation Act by express terms did not apply to "persons whose employment at the time of the injury is casual and not in the usual course of the trade, business, profession or occupation of the employer," etc. Thus the Alabama Act is practically identical with the North Carolina statute. The court held that the injured employee was performing the incidental and necessary repair work on the employer's house, and, therefore, entitled to the benefits of the Compensation Act.

Section 14 (b) of the North Carolina Compensation Act provides that "this Act shall not apply to casual employees, farm laborers," etc. This section, however, is not totally repugnant to section 2 (b) for the reason that even if the employment be casual the employee is still entitled to compensation if he was injured while "in the course of the trade, business, profession or occupation of his employer," etc.

Upon the whole record we are of the opinion that the award was properly made, and the judgment is affirmed.

INDEX

ACCIDENT

Defined.—An accident occurs within a restricted period of time, if not suddenly. 1—198.

AMPUTATION

Will be ordered.—Where finger because of injury interferes with work and employee desires amputation employer shall furnish necessary operation. 1—296.

AGREEMENTS

Approval of.—Where plaintiff and defendant enter into an agreement just prior to the hearing and hearing commissioner approves agreement, no necessity for conducting hearing. 1—14.

ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

After work hours.—While testing out machine after hours of work, voluntarily relieving co-employees of duty with consent of employer's agent, deceased met with accident resulting death, held to arise out of and in the course of employment. 1—99.

Assault.—(Conrad *v.* Cook-Lewis, Supreme Court Decision). 1—465.

Assault.—Growing out of ill feeling between two employees where fellow employee showed lack of respect resulting in subsequent shooting of injured held to be result of an accident arising out of and in the course of employment. 1—20.

Assault.—Injury is received in the course of employment when it comes while the workman is doing the duty which he is employed to perform. It arises out of employment when there is a causal connection between the conditions under which the work is required to be done, and the resulting injury when the injury can be seen to have been contemplated by a reasonable person familiar with the situation. Causative danger must be peculiar to the work—not common to the neighborhood—must not have been foreseen or expected. Must appear to have had its origin in risk connected with the employment, and to have flowed from the source as a rational consequence.

Injury resulting from assault caused by personal malice disassociated from the employment not compensable. 1—131.

Barbecue.—There must be some causal connection between the accident and job. Where employer's business is selling automobiles and plaintiff was injured while attending barbecue given by employers, accident does not arise out of employment. 1—153.

Baseball player.—Where employer sponsors ball team, furnishes equipment, organizes same and supports it and injury results from playing the game, compensation is payable. 1—433.

Burden of proof.—Claim denied on grounds that claimant failed to sustain the burden of proof that injury resulted from an accident which arose out of and in the course of the employment. Burden of proof on claimant to establish by preponderance of evidence that injury resulted from an accident arising out of and in the course of the employment. 1—9.

Delivering message.—Employee while delivering message to another employee about master's business and sustains injury entitled to compensation. 1—320.

Disease.—Section 2, subsection (f), provides that disease to be compensable must result naturally and unavoidably from the accident. An eye once infected the way is open for further infection which is natural and inherent, even though subsequent infection comes from external source. Tendency is toward any and all infection. Disease unavoidable where common prudence and foresight cannot prevent it. Not necessary to show the source of infection by direct evidence. The Act should be liberally and broadly construed so as to effect its general purpose. Where a direct causal connection is shown between the injury and the disease, it is attributable thereto and compensation allowed. 1—124.

Drowning.—"Out of" points to the origin of cause of the injury, "in the course of" to the place and circumstance of injury. Injury may occur in course of employment and not arise out of. Night watchman drowned on duty. Drowning resulting from act performed during excitement presumed for purpose of preserving master's property, although bad judgment used arises out of employment. 1—65.

Going home.—Accidental injury occurring on trip from place of work to home not compensable nothing else appearing. 1—35.

Going to work.—This is the most perplexing question presented where the facts do not specifically bear out that the accident does arise out of and in the course of employment. Each case must be decided with reference to its own attendant circumstances and argument by analogy is valueless. There must be some casual connection between the accident and the employment. An accident happening on premises of employer is an aid in determining this question, especially where injury occurs after injured employee arrives on the premises and had not actually started work, and after quitting work before actually leaving employer's premises—the accident is held to arise out of and in the course of employment.

Where injury to employee results in accident while running up stairs to place of work held to arise out of and in the course of the employment. 1—17.

Horseplay.—Evidence failed to show that "dead rat" placed on seat of car attributed as cause of car backfiring, breaking claimant's arm, was an injury arising out of and in the course of the employment. 1—243.

Horseplay.—Injury resulting from employee throwing arm against glass held in hand of another employee held to arise out of and in the course of employment where no evidence of horseplay. 1—1.

Lunch hour.—Where deceased's employment required continuous duty from 7 a.m. until 6 p.m. and while upon a trip as delivery boy which carried him past his home at lunch hour and he stops to eat and while proceeding thereafter upon his duties happens to accident resulting in death; held to be death caused by injury by accident arising out of and in course of employment. 1—164.

Lung collapse.—Strain causing collapse of lung held injury by accident arising out of and in course of employment. 1—158.

No iron rule.—The term "arising out of the employment" is broad and comprehensive and perhaps not capable of precise definition. It must always be interpreted in the light of the facts and circumstances of the given case. Usually the courts have insisted that there must be some causal connection between the injury and the employment. However, the basic idea of the term is that the employment of workers in industry creates certain risks to which employees are subjected in the performance of their duties. It is apparent that the risk of one employment would differ from the risk of another employment, and, therefore, no iron rule of liability can be applied in all cases. (Supreme Court decision). 1—522.

Outside regular duties.—Where workman intervenes and does something useful or helpful to the master, although outside the special duties of employment, the legislature intended language to cover broader scope and not limit right to compensation to injuries sustained "when doing the work he was employed to perform." 1—420.

Personal business.—Slight and not unusual deviation from strict course of duty or from ordinary route or that selected by master and work if temporarily abandoned, has been resumed, does not constitute abandonment of employment so as to bar rights to compensation. 1—164.

PERSONAL MISSION.—Employer condoning practice of employees filling radiator of personal auto from hot water vat on employer's premises during work hours and injury results when flooring over vat breaks and precipitates employee into hot water, injuries and burns resulting compensable. 1—395.

PRE-EXISTING DISEASE.—Where evidence fails to show that accident accelerated or aggravated a pre-existent disease, claim denied. 1—163.

STREET RISKS.—Employee injured by using streets in vehicles of travel on his employer's business entitled, as general rule, to compensation without proof of especial exposure to risk. 1—207.

STREET RISKS.—Where assistant manager required to go to home office in another town and sustains injury by accident in auto wreck enroute, injury arises out of and in course of employment. 1—363.

TRANSPORTATION.—Where transportation not furnished by the employer and the plaintiff was at the time of the accident returning home from work, the accident held not to arise out of and in the course of the employment. 1—35.

ASSAULT

DISASSOCIATED FROM WORK.—Where evidence fails to show that fight resulted from matters pertaining to claimant's employment, claim will be denied. 1—237.

PERSONAL.—Where assault is result of personal malice growing out of matters personal to two parties disassociated with the work—not compensable. 1—131.

ROBBERY.—Where highwaymen compel assistant manager of theatre at point of gun to accompany them from end of car line back to theatre, then to open safe for purpose of robbery, thereafter injuries are inflicted by robbers striking him over head and broken ankles result, the injuries are held to be by accident arising out of and in the course of the employment. 1—381.

SHOT GUN.—(Conrad *v.* Cook-Lewis—Supreme Court Decision). 1—465.

SHOOTING.—Assault growing out of ill feeling between two employees where fellow employee showed lack of respect resulting in subsequent shooting of injured held to be result of an accident arising out of and in the course of employment. 1—49.

THIRD PARTY.—Assault by third party grounds for recovery of damages in civil action. 1—270.

UNPROVOKED.—Where assault made was not provoked by employee injury resulting arose out of and in the course of the employment. 1—73.

WORK AS SOURCE.—Expected that disagreements will arise in connection with the work resulting in blows and fights, injury from such source a risk of employment and arises out of and in course of employment. 1—245.

ATTORNEYS

RESPECT.—Commission endeavors to treat counsel with all due consideration and will continue to do so. At the same time the Commission will require of parties and counsel the same consideration. 1—56.

AVERAGE WEEKLY WAGES

COMPUTING.—At time of accidental injury, average weekly wages found to be the same as was received by other employees doing the same class of work. 1—7.

COMPUTING.—Computed on basis of wages received at time of occurrence of accident and not by using earnings in other employment during whole of previous year. 1—387.

COMPUTING.—Paragraph 2, Subsection (e) of Section 2 applies only to employees and not dependents and personal representatives. 1—357.

COMPUTING.—Where employment is brief, wages deceased would be earning were it not for injury, is correct basis for that insurance premiums are collected on this wage. 1—333.

COMPUTING.—Where employment was for short time rate of compensation figured on basis what plaintiff would have earned "were it not for the injury." 1—88.

The Commission recognizes that the rule restricting the wages to the employment at which the injured was working at the time of the accident may, in some cases, work a hardship, but as we read the statute, no other rule can be resorted to when it appears that the claimant has been regularly employed for fifty-two weeks at a wage that is not in dispute. 1—189.

COMPUTING.—Where period of employment too short and basis of pay for workman doing similar work changed during preceding fifty-two weeks affording no basis for comparison and basis adopted is what employee would be earning were it not for the injury. 1—293.

FIRE FIGHTER.—Unfair to claimant and would work great hardship to calculate average weekly wages of forest fire fighter on basis other than what he would earn in civilian employment. 1—405.

BARBECUE

SALESMAN ATTENDING.—There must be some causal connection between the accident and job. Where employer's business is selling automobiles and plaintiff was injured while attending barbecue given by employers, accident does not arise out of employment. 1—153.

BODILY DISFIGUREMENT

KELOID GROWTH.—Where injury results in keloid growth, common to the colored race and no definite way of determining ultimate size award made for additional disfigurement upon change of condition. 1—480.

PERMANENT; REPULSIVE.—After disfigurement of hands and neck become fixed and permanent and will be repulsive and affect reëmployment Commissioner finds $250.00 fair compensation. 1—92.

TESTICLE.—Loss of testicle is serious bodily disfigurement for which compensation is awarded. 1—501.

BURDEN OF PROOF

UPON CLAIMANT.—Burden of proof on claimant to establish by preponderance of evidence that injury resulted from an accident arising out of and in the course of the employment. 1—9.

UPON CLAIMANT.—Upon claimant and where two incidents on two separate days are alleged as accident causing condition and no report made of occurrence for some time thereafter held no accidental injury. 1—201.

UPON CLAIMANT.—Where employer proves termination of disability burden is upon claimant to establish reoccurrence of disability from same injury. 1—512.

UPON DEFENDANT.—Upon showing that employee sustained an injury by accident, burden is upon defendant to show that result is due not to accident, but to some external force directly causing the result. 1—467.

UPON DEFENDANT. Where accidental injury is admitted, burden is upon employer to prove termination of disability. 1—517.

CASUAL EMPLOYMENT

NOT IN USUAL COURSE TRADE. Even though it be conceded that the employment of the plaintiff was casual, he is not precluded from the benefits of the Compensation Act unless it should also appear that he was not engaged in the course of the trade, business, profession or occupation of his employer. (Supreme Court.) 1—526.

Occasional.—Employment though not continuous is not casual. Casual construed as occasional or incidental without regularity. If employment be for a day or a month not casual. 1—290.

Time.—Where the work being done is a part of the usual course of the trade, business, profession or occupation of the employer, the length of time in which the employee was engaged on the work prior to the accident does not make the employment casual. 1—41.

CLAIM DENIED

Burden of proof.—On grounds that claimant failed to sustain the burden of proof that injury resulted from an accident which arose out of and in the course of the employment. 1—9.

Dislocation of spine.—Where evidence does not by its greater weight sustain claim of injury to spine from fall off the premises of the employer at a place where duty did not require claimant to be, case will be dismissed. 1—423.

COMMON LAW WIFE

Not widow.—Common law marriage not recognized by either North Carolina or Tennessee: therefore common law wife not a widow under the act. 1—277.

CONSTRUCTION OF THE ACT

Ambiguity.—Section 29 being ambiguous rule of our Supreme Court declares Acts of the Legislature that are vague, indefinite and uncertain to be inoperative and void. See Boyd *v.* Brooks, 197 N. C. 655. 1—117.

Liberal.—Act must be liberally constructed. 1—107.

CONTEMPT

Refusal to testify.—Where physician refuses to give professional opinion claiming that it is private property, refusal subjects person to attachment for contempt of Court. 1—441.

COUNTY BOARDS

Education.—It nor its employees can reject the Act, but are bound by its terms. 1—264.

COVERAGE

Persons benefited.—Policies of insurance issued covering an employer's compensation liability under Section 71 is an agreement to pay persons entitled to compensation all benefits covered by the Act. 1—41.

DENTAL TREATMENT

Award for.—Cost of replacing and treating for two teeth awarded against employer. 1—262.

DEPENDENTS

Conclusive.—Persons conclusively presumed dependent entitled to 60 per cent of average weekly wage for 350 weeks subject to maximums and minimums prescribed. 1—258.

Conclusive presumption.—Death resulting from accident occurring after hours of work while performing services for employer and while relieving co-employees with consent of foreman is compensable. Minor children conclusively presumed to be dependent; parents found to be wholly dependent. Compensation divided equally between wholly dependents. 1—99.

DEATH BENEFITS.—Principles expressed in case Smith *v.* Carolina Power & Light Company, Docket 19, cited with approval. 1—175.

DEPENDENTS ENTITLED.—Section 29, void where there are dependents, they receive benefits. Smith *v.* Power Company (Supreme Court). 1—401.

ILLEGITIMATE CHILD.—An illegitimate child acknowledged as dependent at time of death entitled to compensation as being wholly dependent. 1—142.

MOTHER AS.—In determining dependency of mother upon minor son, the amount furnished by the mother out of the son's contributions towards maintenance of son cannot be deducted in arriving at percentage of dependency. 1—409.

MOTHER AS.—Mother of deceased son entitled to 60 per cent of amount contributed weekly by the deceased to support the dependent mother with no deductions for spending money given deceased by the mother.

Inquiry should include question of whether contributions from workman were looked to, depended or relied upon in whole or in part by the family for means of support. 1—144.

PARENTS AS.—Parents dependent to the extent of 100 per cent of the deseased minor son's wages entitled to same as persons wholly dependent. 1—293.

PARENTS AS.—Where parents are dependent upon minor son's earnings for partial support, the cost of maintaining the minor should not be considered in computing the degree of dependency. 1—308.

PARENTS AS PARTIAL.—Parents partially dependent upon deceased entitled to same proportion of weekly payments for benefit of persons wholly dependent as the amount contributed by the employee bears to annual earnings of deceased at time of injury. 1—152.

PARTIAL.—Compensation based upon proportion that contributions by deceased to dependents bears to annual earnings of deceased in employment as fireman. 1—334.

PARTIAL.—Not presumed, but fact in each case governs. 1—357.

PERSONAL REPRESENTATIVE NOT ENTITLED.—Where conclusive presumption of dependency is proven Section 38 applies and Section 29 not applicable, therefore personal representative not entitled to compensation under authority Smith *v.* Power Co., Docket No. 19. 1—102.

PERSONAL REPRESENTATIVE NOT ENTITLED.—Where finding is made that deceased left dependents compensation will be denied personal representative for that the Legislative intent was that the benefits of the Act should flow to the dependents of the deceased employee. Section 29 in case of death is ambiguous and not specific. Sections of the Act providing for payment to specific beneficiaries control awards made thereunder. 1—117.

WIDOW AS.—Where widow has not abandoned nor divorced deceased husband she is entitled to compensation as wholly dependent. 1—293.

WHOLLY.—Entitled to 60 per cent of average weekly wage for a period of 350 weeks plus funeral expenses not to exceed $200.00. 1—290.

WHOLLY.—Legal widow and children entitled to compensation as wholly dependents, children raised in deceased home for a period of more than five years prior to death also wholly dependent and death benefits divided among the wholly dependents. 1—230.

WHOLLY.—Where deceased leaves dependents, who, from the evidence, are wholly dependent an award for 60 per cent of the average weekly wages for 350 weeks will be made. 1—24.

WHOLLY.—Where findings are that deceased left dependents personal representative not entitled to compensation under either Section 29 or 40. This conclusion emphasized upon considering that administrator cannot be forced to qualify prior to hearing requested by dependents and if qualified thereafter has the right to be heard if Act otherwise construed. 1—172.

DISEASE

Apoplexy.—Where death is due to apoplexy and expert evidence fails to show a causal connection of the disease and a fall occurring shortly prior thereto, death held result of the disease and not an accident. To be compensable the employment must set in motion approximate cause that can be traced to be the result of an injury by accident and not to any other agency. 1—310.

Bell's palsey; or facial paralysls.—Usually caused by exposure to dampness and cold air at night, not permanent and does not incapacitate one from work, although embarrassing and where evidence does not suggest that exposure on any particular occasion to dampness from humidifiers no proof of accident causing this condition. 1—203.

Bright's disease.—Where death of an employee results from chronic kidney trouble and not accidental injury compensation denied. 1—373.

Boils.—Infection from having arms constantly in impure grease not an injury by accident. 1—275.

Boils.—Plaintiff failed to prove occurrence of an accident resulting in boils. Claim denied. 1—97.

Dermatitis.—Disease caused by use of paints and varnish not an injury by accident. 1—276.

Dew poison.—Disability resulting from exposure to dew over a considerable period of time is not the result of an accident. 1—198.

Disease.—Where disease results naturally and unavoidably from the accident, injured entitled to compensation. 1—457.

Eczema.—Where disease results from continual dipping of hands into dye, held not an injury by accident. 1—386.

Fainting.—When fainting due to excessive heat and not "fits," and person in going to window for fresh air and is burned, resulting injury compensable. 1—261.

Gastric ulcer.—Burden upon claimant to at least establish some connection between an alleged accident and chronic gastric ulcerated condition. 1—201.

Gastric ulcer.—Is of gradual development and is perforating ulcer of lining membrane of stomach which in this case chronic and no proof that death caused thereby was result of accident. Claim denied. 1—179.

Gonorrhea ophthalmia.—Section 2, sub-section (f), provides that disease to be compensable must result naturally and unavoidably from the accident. An eye once infected the way is open for further infection which is natural and inherent, even though subsequent infection comes from external source. Tendency is toward any and all infection. Disease unavoidable where common prudence and foresight cannot prevent it. Not necessary to show the source of infection by direct evidence. The Act should be liberally and broadly construed so as to effect its general purpose. Where a direct causal connection is shown between the injury and the disease, it is attributable thereto and compensation allowed. 1—124.

Heart.—Mitral regurgitation of heart found not to be result of an accident arising out of and in course of employment. 1—211.

Heat stroke, paralysis.—Where employment subjects employee to conditions more conducive to heat stroke than the general public is subjected to, disability or death resulting is compensable. Where claimant not exposed to any greater degree of heat because of his job than were his fellow employees or the public in general nor where conditions under which work being done would cause undue exhaustion claim denied. The rational mind must be able to trace the resultant injury to a proximate cause set in motion by the employment and not by any other agency. 1-24.

Heat stroke or prostration.—Where resulting from high blood pressure which was just as likely to have occurred during the night while asleep as at the mill not compensable—exposure to no greater degree of heat than fellow employees or public in general exhaustion under circumstances not a risk of employment. 1—250.

Kidney stone.—Where occurrence of accidental strain is proven, the finding of a kidney stone does not force the conclusion that the kidney stone existed prior to the accident or defeat right to compensation. 1—489.

Lung collapse.—Strain causing collapse of lung held injury by accident arising out of and in course of employment. 1—158.

Nephritis.—Where accidental injury from burns develops into nephritis which affects heart and kidneys also causing total blindness, compensation awarded as for permanent total disability. 1—376.

Osteo-arthritis.—Where not the result of an injury by accident is not compensable. 1—313.

Paralysis—Where injury results in paralysis, claimant entitled to compensation. 1—441.

Pre-existing.—Ulcers of stomach where not proven by clear and satisfactory evidence to be the result of an accident arising out of and in the course of employment. Claim denied. 1—90.

Pre-existing.—Where evidence fails to show that accident eccelerated or aggravated a pre-existent disease, claim denied. 1—163.

Prolapsus.—Where evidence fails to show causal connection between an injury by accident and misplacement of womb, claim denied. 1—412.

Prostatitis and kidney stones.—Where injury is not result of accident and was not proximately caused by the employment or the conditions under which employee was required to work claim dismissed. 1—80.

Pyelitis.—Where disease does not result naturally and unavoidably from an accident, Compensation for disability from disease denied. 1—353.

Syphilis.—Preëxisting syphilitic condition aggravated and accelerated by accidental injury is compensable. 1—107.

Syphilis.—Where accelerated to stage of disability by accident compensable. 1—215.

Tetanus.—Failure to report occurrence of nail puncture wound until after death from tetanus and too late to administer Tetanus antitoxin serum prejudices employer's rights. 1—349.

Tumor.—Where exploratory operation discloses tumor in the abdomen, and further operation disclosed intestines congested with some distension, the inflammation being foreign to the tumor, but resulting from nervous condition caused by muscle strain from excessive pressure of boards or planks on the nerves of the neck and shoulder, the disability resulting is compensable. 1—429.

EYE

Enucleation.—Commission will not order enucleation where specialist will not recommend. 1—389.

Gonorrhea ophthalmia.—Section 2, sub-section (f), provides that disease to be compensable must result naturally and unavoidably from the accident. An eye once infected the way is open for further infection which is natural and inherent, even though subsequent infection comes from external source. Tendency is toward any and all infection. Disease unavoidable where common prudence and foresight cannot prevent it. Not necessary to show the source of infection by direct evidence. The Act should be liberally and broadly construed so as to effect its general purpose. Where a direct causal connection is shown between the injury and the disease it is attributable thereto and compensation allowed. 1—124.

Loss of.—Loss of eye from stray bullet from hunter's gun held compensable. 1—393.

Loss of.—Section 31 (q) provides for 100 weeks in addition to temporary total disability. 1—238.

Loss of vision.—Compensable as permanent total disability. 1—376.

Loss of vision.—Fifty per cent loss of vision in each eye entitles claimant to compensation for one hundred weeks. 1—256.

Loss of vision.—Thirty-eight per cent loss of vision in one eye entitles claimant to 38 weeks' compensation. 1—391.

Loss of vision.—Loss vision one eye entitled claimant to 100 weeks. 1—186.

Loss of vision.—Where evidence shows no causal relation of injury by accident to loss of vision in one eye compensation denied. 1—380.

Vision.—Where proof does not establish loss of vision as result of accident, not compensable. 1—151.

Muddy sinus.—Over left eye could have been caused by a number of things including hot tar, usually attributed to cold. 1—194.

Treatment.—When doctor in eye injury directs, as agent for employer, home treatment, and if more susceptible to gonococci germ at home than at hospital, master chargeable with injury resulting therefrom. 1—467.

DISFIGUREMENT

Change of condition.—Where award for disfigurement made and change of condition occurs increasing the disfigurement the award will be amended to provide for the additional disfigurement. 1—480.

Determination of.—Where it is impossible because of emaciated condition of plaintiff the Hearing Commissioner will continue the case for further action so as to determine if serious facial or head disfigurement will result. This case being the result of plaintiff being struck in jaw by splinter thrown from "hog." 1—5.

Determination of.—Where the extent of disfigurement cannot be determined at first, hearing will be continued to future date. 1—25.

Interfering with re-employment.—Facial disfigurement as held in case of Henninger *v.* N. C. Industrial Commission is not a disability as that term is generally used unless it interferes with the workman's re-employment. Disfigurement to be compensable must be serious—not trifling. Claim denied. 1—58.

Not serious.—Claimant did not sustain serious facial disfigurement by losing two teeth which were replaced by employer. 1—263.

Not serious.—Where the finding is there is no serious facial disfigurement compensation therefor will be denied. 1—5.

Repulsive.—For serious facial and head disfigurement both repulsive to the eye and making employment more difficult compensation award of $750.00. 1—61.

Review of.—Award of $750.00 reduced to $500.00 upon review by Full Commission. 1—101.

Scar on forehead.—For scar on forehead extending from lower center upward over right eye compensation allowed in amount of $150.00. 1—186.

Should be serious.—A disfigurement to be compensable should be serious and to be deemed serious must not be trifling, but such as to more or less affect the employee's ability to procure employment at customary occupation, or make employee more or less repulsive to the public and more or less unsightly in the eyes of his fellowman. 1—3.

Should be serious.—As was held in the case of Henniger *v.* N. C. Industrial Commission, to be compensable a disfigurement must be serious and not slight and trifling. Claim dismissed because disfigurement not serious. 1—53.

FAILURE TO PROSECUTE CLAIM

Claim denied for.—Claim denied when claimant fails to appear and prosecute claim. 1—196.

FAINTING

FROM EXCESSIVE HEAT.—When fainting due to excessive heat and not "fits," and person in going to window for fresh air and is burned, resulting injury compensable. 1—261.

FARM LABOR

WHAT CONSTITUTES.—Where a farm laborer as part of his duties as such is required to do odd jobs of carpentry in repairing buildings incidental to farming, he does not lose his status as farm laborer, and injuries he sustains do not come within the Act. 1—432.

FATAL CASES

DEATH RESULTING AFTER EIGHT MONTHS.—Where injury directly results in death although eight months after accident, compensation payable to dependents with deduction for payments made prior to death of employee. 1—473.

DEPENDENCY IN.—Death resulting from accident occurring after hours of work while performing services for employer and while relieving co-employees with consent of foreman is compensable. Minor children conclusively presumed to be dependent; parents found to be wholly dependent. Compensation divided equally between wholly dependents. 1—99.

DEPENDENCY IN.—Total dependents allowed compensation on basis of 60 per cent of average weekly wages for period of 350 weeks, plus burial expenses of $200.00 and medical and hospital fees. 1—52.

DEPENDENCY IN.—Under Section 38 of the Act dependents partially dependent upon deceased employee entitled to the proportion of the amount due wholly dependents as the amount contributed by employee to partial dependents bears to the annual earnings of the deceased. 1—36.

DEPENDENCY IN.—Where conclusive presumption of dependency is proven Section 38 applies and Section 29 not applicable, therefore personal representative not entitled to compensation under authority Smith *v.* Power Co., Docket No. 19. 1—102.

PERSONAL REPRESENTATIVE; DEPENDENTS.—Where finding is made that deceased left dependents compensation will be denied personal representative for that the Legislative intent was that the benefits of the Act should flow to the dependents of the deceased employee. Section 29 in case of death is ambiguous and not specific. Sections of the Act providing for payment to specific beneficiaries control awards made thereunder. 1—117.

FINDINGS OF FACT

CONCLUSIVE WHEN.—The Industrial Commission found as a fact that the plaintiff was engaged in the course of the employer's business and there is evidence in the record to support such finding. In such event, whether the Appellate Court agrees with the conclusion of the Commission or not, the finding of such fact is conclusive, by express declaration of the statute. (Supreme Court). 1—526.

FUMES

LACQUER.—Where lacquer does not contain poison in sufficient quantities to give off toxic fumes, evidence is not sufficient to sustain claim for compensation for illness alleged to be caused thereby. 1—435.

GAS POISON

DEATH FROM.—Evidence does not support claimant's theory of death of deceased from gas poison while impersonating a prisoner in an employment as "stool pigeon." 1—438.

GOING TO AND FROM WORK

Caring for team.—Where duties of employee required that he care for team, taking it to and from the place of work, an injury received while doing this is compensable. 1—425.

Leaving work.—School teacher on road, returning home after school hours is subject to same hazard on country road as are all persons. Claim denied. 1—407.

Personal mission.—School teacher returning from home to his school district after having been on a personal mission, sustains injury, it does not arise out of employment. 1—408.

Transportation.—Where transportation not furnished by the employer and the employee was at the time of the accident returning home from work, the accident held not to arise out of and in the course of the employment. 1—35.

GUNSHOT INJURIES

Accidental.—Accidental discharge of gun by a co-employee during course of employment and under facts of this case held to arise out of employment. 1—221.

Co-employee inflicting.—Where injuries result from accidental discharge of gun while employee is in course of and the accident arises out of employment held compensable. (Chambers *v.* Oil Co.), Supreme Court decision. 1—522.

Squirrel hunting.—Where injury is a result of wound inflicted while employee is preparing to hunt squirrels and not connected with his duty, claim denied. 1—514.

HEAD AND BODILY DISFIGUREMENT

Serious only; not from healing of cuts, etc.—For serious head disfigurement $250.00 award; serious bodily disfigurement $750.00 award. Not the Legislative intent to allow compensation for usual ordinary disfigurement resulting from healing of cut or laceration. Disfigurement must be serious. 1—61.

HEARINGS

Additional evidence.—Before review by full Commission additional evidence may be taken, but in this case request for review and taking of additional evidence frivolous and a proper case for imposing penalties with all costs against defendants. 1—474.

Newly discovered evidence.—Rule of Commission must be met before rehearing will be granted to introduce additional evidence. 1—412.

Summary manner.—Will be conducted in summary manner and in such manner as to ascertain the substantial rights of the parties, with right to consider every possible view and determine all necessary questions so that complete determination within limits of Act may be had. 1—227.

HERNIA

Claim denied.—Failure to meet five requirements of Section 2 (r), compensation denied. 1—181.

Claim denied.—Failure to meet requirements of Section 2 (r) burden of proof being upon plaintiff, claim denied. Dilated external ring is not a hernia as contemplated by Act. 1—94.

Claim denied.—Opinion in Hollifield *v.* Briggs-Shaffner Company, Docket No. 13, cited with approval. Where section 2 (r) not complied with medical treatment and compensation for hernia denied. 1—135.

Claim denied.—Where claimant fails to prove the existence of a hernia under conditions prescribed in Section 2 (r), operation therefor to be denied. 1—113.

Death from operation for pre-existing.—Death resulting from hernia operation does not entitle dependents to compensation where hernia was pre-existing. 1—483.

Meeting requirements.—Where plaintiff establishes the requirements of Section 2 (r), an award will be ordered for operation for hernia and compensation for total disability. 1—116.

Meeting five requirements.—Proof of hernia fulfilling five requirements of Section 2 (r) entitles claimant to operation and necessary medical and hospital bills. 1—193.

Meeting five requirements.—When plaintiff's accidental injury results in a hernia meeting the five requirements of Section 2 (r) of the Act the defendants must tender an operation within time fixed by the Commission or the plaintiff will be directed to procure such operation, the cost of same to be awarded against defendants; payments of compensation during total disability resulting from the operation awarded against defendants. 1—11.

Meeting five requirements.—Where five requirements of act are met operation must be tendered by employer to repair the hernia. 1—484.

Meeting five requirements.—Where requirements of Section 2 (r) have been met claim entitled to operation and compensation. 1—155.

Must be traumatic.—A real traumatic hernia resulting from force applied directly to abdominal wall either puncturing or tearing wall is only accidental hernia considered, others of either congenital or slow development, a disease rather than accidental injury, unless conclusive proof that hernia was immediately caused by sudden effort or strain. 1—242.

Must be traumatic.—Hernia will only be considered an accident where it is real traumatic hernia resulting from the application of force directly to the abdominal wall either puncturing or tearing the wall. 1—26.

Must be traumatic.—Where the requirements of Section 2, sub-section (r) not proven, medical treatment and compensation will be denied. Hernia is a disease; ordinarily develops gradually. Natural tendency is to try to explain the existence of hernia by some unusual circumstances, such as slipping or lifting, etc. Real troumatic hernia is compensable, necessitating application of force sufficient to puncture or tear abdominal wall, accompanied by severe pain and immediate disability necessitating medical treatment. 1—45.

Not meeting five requirements.—Where it is shown that hernia did not result as required under Section 2 (r) of the Act by meeting the five requirements thereof, claim for compensation is denied. 1—26.

Potential hernia.—Act silent about potential hernia. Where protrusion immediately follows an accident and otherwise meets requirements of Section 2 (r) operation allowed and compensation awarded. 1—205.

Potential hernia.—Potential hernia not recognized but where five requirements are met, operation and compensation allowed. 1—505.

Pre-existing.—Existence of hernia prior to accident is bar to compensation. 1—220.

Pre-existing.—Upon the findings that there was a pre-existing hernia, claim for benefits under Section 2 (r) denied. 1—54.

Previous operation for.—Although twice operated upon for hernia prior to accidental injury. If physical examination made at time of employment reveals no hernia. Hernia resulting from accidental injury compensable. 1—161.

Refusal of operation for.—Where injured employee refuses to undergo an operation for hernia, Carrier must tender operation and employee entitled to same within one year after date of accident, if he so elects. 1—17.

Strain defined.—Compensable injury includes one result of a strain proving more than the body could bear, not necessarily an unusual strain, but the unusual and unexpected injury resulting from a particular strain that constitutes the accident. 1—427.

HORSEPLAY

Abandoned before injury.—Where employee had been engaged in play but had abandoned it at time of being injured by fellow employee claim for compensation allowed. 1—507.

Burden of proof.—Where defendant fails to sustain burden of proof that accident was result of horseplay; and accident causing injury is found to arise out of and in the course of employment, compensation will be awarded. 1—1.

Disassociated from work.—Where sportive act of fellow workman, independent of and disconnected from performance of any duty resulting injury does not arise out of employment. 1—239.

"Fellow servant" doctrine as.—The doctrine of horseplay, which excludes a workman from compensation, although he is not at fault, and does not engage therein, is inconsistent with the underlying philosophy of compensation acts, which are designed for the very purpose of eliminating fault as a basis for determining liability.

Indeed, if a workman be denied compensation solely upon the ground that he was injured by the "sportive act" of a fellow workman, it would seem to be clear that the old "fellow servant" doctrine is appearing in a brand-new suit of legal clothes and parading through the law under the brand-new name of "horseplay." (Supreme Court Decision.) 1—524.

Where habit or custom acquiesced in.—A moment's diversion from work to joke or play a prank upon a fellow employee is reasonably to be expected and is one of the perils of the service, a course of sportive conduct among employees becoming a fixed habit or custom with the knowledge and acquiescence of the employer is a peril of the work and resulting injury arises out of and in the course of the employment. 1—221.

INDEPENDENT CONTRACTOR

Benefits as basis.—Admitted by counsel for defendant and Commission will take judicial notice of the fact, premium rates in North Carolina are based upon payment to personal representative in case of death sixty per cent of average wages at the time of death. 326.

Benefits as basis.—Judicial notice taken of insurance premium being based on the minimum of $7.00 and maximum of $18.00. If the minimum can be increased the maximum can and should be increased for the same reason. 1—47.

Defined.—An independent contractor has been defined as one who exercises an independent employment, contracts to do a piece of work according to his own judgment and methods and without being subject to his employer except as to the results of the work and who has the right to employ and direct the action of the workmen, independently of such employer and freed from any superior authority in him to say how the specified work shall be done or what the laborers shall do as it progresses." Greer *v.* Construction Co., 190 N. C., 632; 130 S. E., 739. The principle thus announced is amply supported by the authorities assembled in the Greer case, supra. (Supreme Court.) 1—525.

Direction and control governs.—Where the facts found show that the employment was to be paid for by the hour and the employer retains sufficient direction and control of the work to establish relationship of master and servant, the employment is not that of independent contractor. 1—41.

Employees of.—One injured in an employment by an independent contractor employing less than five employees and neither have elected to accept the act, the person for whom the work is being done is not liable for compensation. 1—422.

Insurance agent as.—A person engaged in writing insurance for various companies is free to go when and where he chooses and no control is retained over his actions; not an employee but independent contractor. 1—378.

NO CONTROL EXERCISED IN.—Person paid for piecework cutting ties employing others on hourly basis to assist, owner exercising no supervision over work or instructions as to deails of performance held independent contractor, not an employee. 1—209.

INSURANCE RATES

FUTURE RATE BASIS.—Unnecessary medical and hospital costs resulting from failure to furnish proper treatment at time of occurrence of injury is reflected in future rates penalizing entire industry. 1—84.

INTOXICATION

BURDEN OF PROOF.—Burden upon defendants to prove accident resulted from intoxication. 1—255.

JURISDICTION

LESS THAN FIVE EMPLOYEES.—Where evidence shows less than five employees Commission will deny jurisdiction. 1—140.

PRIOR TO JULY 1ST.—Where accident occurs prior to effective date of Act claim will be dismissed. 1—30.

LOSS OF USE

NOT PROVEN.—Failure to prove any loss of use, claim dismissed except for actual temporary total disability. 1—93.

NOT PROVEN.—Where the evidence shows no loss of use after recovery from total disability compensation therefor to be denied. 1—122.

OF HAND, INSTEAD OF FINGERS.—Where medical evidence shows, in addition to loss of fingers, a crushed, burning wound over the posterior part of the hand, in addition to specific loss of fingers, award will be for compensation under sub-section (t) of Section 31. 1—47.

LOSS OF VISION

ONE EYE.—Loss of use of one eye under Section 31 (q and t) entitles injured employee to sixty per cent of average weekly wages for 100 weeks. 1—7.

LUMP SUM AWARD

ALLOWED.—While it is to the best interest of afflicted old people and all the parties at interest, lump sum payments of awards will be granted. 1—24.

ALLOWED.—Where to best interest of employee and no hardship upon employer award will be made for sufficient amount only to return employee to his native state. 1—105.

ALLOWED.—Where it is to best interests of employee and an uninsured employer is in process of dissolution lump sum award will be made. 1—78.

MUST BE APPROVED.—Settlements for future payments due in a lump sum must be submitted to the Commission for approval. 1—212.

LUNCH HOUR

RETURNING FROM.—Where deceased's employment required continuous duty from 7 a.m. until 6 p.m. and while upon a trip as delivery boy which carried him past his home at lunch hour and he stops to eat and while proceeding thereafter upon his duties happens to accident resulting in death; held to be death caused by injury by accident arising out of and in course of employment. 1—164.

MARITIME EMPLOYMENT

NO JURISDICTION.—Accident occurring upon navigable waters is exclusively under admiralty jurisdiction and not under jurisdiction of this Commission. 1—365.

MAXIMUM RATE OF COMPENSATION

Insurance rates based on.—Judicial notice taken of insurance premium being based on the minimum of $7.00 and maximum of $18.00. If the minimum can be increased the maximum can and should be increased for the same reason. 1—47.

MEDICAL ATTENTION

Neglect to provide.—Inexcusable neglect to provide proper and necessary medical attention and treatment causing arthritis, resulting in stiffness of wrists and loss of motion award will direct needed treatment, hospitalization and operation to reduce permanent loss of use; also compensation for temporary total disability until claimant's injury assumes permanent status. 1—84.

Not tendered.—Upon findings that employer not offered medical treatment cannot be said that injured refused medical treatment. 1—60.

Payment for.—Where employer fails to pay physician's bill for services rendered injured employee and a hearing is necessary thereon an award will be for the payment of the bill and allowance for physician's fee for attending the hearing. 1—114.

Providing.—Evidence insufficient to show that claimant not receiving proper medical attention. 1—387.

Qualification of physician.—Supreme Court's dicta as to qualifications to be possessed by physician or surgeon used as test of ability and learning required of practitioners in industrial accident cases. 1—416.

Refusal justified.—Refusal to have eye enucleated where not recommended by specialist not a refusal of medical treatment. 1—389.

Refusal justified.—Where injured employee has submitted to and accepted medical treatment to effect cure which gave unsatisfactory results, compensation will not be denied where employee refuses to undergo experimental operation or rebreaking of collar-bone. 1—184.

Refusal not justified.—Where employer has tendered services of physician and surgeon licensed by the Medical Board, refusal to accept services not justified where finding is that physician is competent and compensation denied during period of refusal. 1—416.

Refusal of.—Refusal of medical care bar to compensation during refusal. 1—484.

Refusal of.—Where evidence does not support contention of refusal of medical treatment compensation will not be denied. 1—171.

MENTAL AND PHYSICAL SUFFERING

Not compensable.—Excruciating pain and mental suffering not compensable. 1—58.

MOTION FOR NON-SUIT

Uselessness of.—Motion for non-suit in hearing before Commission is a useless procedure for that the Commission is required by Section 58 to make findings of fact which are binding and conclusive on the parties. If there is any merit or necessity for non-suit this is waived by introducing evidence thereafter and not renewing the motion. Satterthwaite *v.* Davis, 186 N. C., p. 566. 1—1.

NEGLIGENCE

Does not bar.—Negligence of employee not sufficient grounds for denying compensation. 1—65.

NIGHT WATCHMAN

Assault—personal matters.—Assault on night watchman during the course of his employment does not arise out of employment where assault resulted from malice personally existing between two parties and entirely disassociated from the employment.

Assault—personal matters.—While on duty night watchman shot from ambush as result of ill feeling over matters personal to deceased and assailant, death not a result of an accident arising out of the employment. 1—217.

Drowning.—Compensation allowed where night watchman drowned in effort to conserve master's property. 1—200.

Drowning.—Where deceased as night watchman dives into canal, presumably to further master's business, dependents entitled to compensation. 1—65.

NON-INSURER

Penalty for.—Bond required of non-insured employer who has not rejected Act to cover payments of compensation and for necessary operation. 1—238.

Penalty for.—Claimants electing to accept compensation where employer has neither rejected the act nor provided insurance, award for compensation made for commuted amount to be paid into office of Clerk Superior Court, otherwise penalty will accrue. 1—139.

Penalty for.—Deposit of commuted amount of death award required to be made into office of Clerk of Supreme Court where no insurance provided. 1—359.

Penalty for.—Employer failing to prove insurance when subject to the Act required to make bond to cover compensation payable. 1—290.

Penalty for.—Failure to reject the Act or comply with Section 67 subjects employer to penalty. 1—246.

PAYMENTS

Penalty for non.—Compensation due under the Act must be paid in accordance therewith or carrier will be subject to penalties. 1—212.

PENALTIES

Non-payment awards.—Failure to make payments when due unless permission granted to discontinue payments by Commission subjects carried to 10 per cent penalty. 1—227.

PERMANENT TOTAL DISABILITY

Nephritis.—Burns causing nephritis which results in total blindness and affects heart and kidneys compensation for permanent total disability allowed. 1—376.

Traumatic neurosis.—Where injury results in traumatic neurosis and evidence shows no cure can be made, compensation allowed for permanent total disability. 1—517.

PERSONAL BUSINESS

Slight deviation no bar.—Slight and not unusual deviation from strict course of duty or from ordinary route or that selected by master and work if temporarily abandoned, has been resumed, does not constitute abandonment of employment so as to bar rights to compensation. 1—164.

PERSONAL REPRESENTATIVE

No dependents.—Deceased employee leaving no dependents, personal representative entitled to payment of commuted value of 60 per cent of average weekly wages of deceased for 350 weeks less funeral expenses. 1—283.

No dependents.—Deceased employee leaving no dependents, personal representative entitled to 60 per cent of average weekly wages for 350 weeks, less burial expenses. 1—324.

No dependents.—Deceased leaving no dependents, the personal representative entitled to same compensation as persons wholly dependent. 1—305.

No dependents.—Under Section 40, where deceased leaves no dependents, personal representative entitled to same amount as those wholly dependent. 1—277.

Not entitled.—Principles expressed in case Smith *v.* Carolina Power & Light Company, Docket 19, cited with approval. 1—175.

Not entitled, when.—Where findings are that deceased left dependents personal representative not entitled to compensation under either Section 29 or 40. This conclusion emphasized upon considering that administrator cannot be forced to qualify prior to hearing requested by dependents and if qualified thereafter has the right to be heard if Act otherwise construed. 1—172.

Not entitled, when.—Where finding is made that deceased left dependents compensation will be denied personal representative for that the Legislative intent was that the benefits of the Act should flow to the dependents of the deceased employee. Section 29 in case of death is ambiguous and not specific. Sections of the Act providing for payment to specific beneficiaries control awards made thereunder. 1—117.

When entitled.—Section 29, void. Section 38 applies where there are dependents. Section 40 where no dependent (Smith *v.* Power Co., Supreme Court). 1—401.

PRINCIPAL CONTRACTOR AND SUB-CONTRACTOR

Order of liability.—Award will be made against immediate employer who was sub-contractor, then against Insurance Carrier of principal contractor. In case not paid award is against the principal contractor. 1—15.

PHYSICIAN

Qualification of.—Supreme Court's dicta as to qualifications to be possessed by physician or surgeon used as test of ability and learning required of practitioners in industrial accident cases. 1—416.

Refusal to testify.—Where physician refuses to give professional opinion claiming that it is private property, refusal subjects person to attachment for contempt of Court. 1—441.

RECEIPS FOR PAYMENTS

Due minors.—Natural guardian has right to receive and receipt for weekly payments although aggregate amounts of previous weekly payments made exceed $300.00, for that right to such payments has been discharged by payment, leaving amount to which minor entitled only one weekly payment unpaid. 1—258.

Due minors.—Receipt from natural guardian acquits and discharges defendants of all claims and demands of minor children. 1—52.

RECURRENCE

Disability.—Disability recurring traceable to initial injury, entitles employee to compensation against employer in whose service at time of injury. 1—288.

REPORTS

Accident.—Failure to report occurrence of accident alleged to have happened September 13 or 20 until October 12 and further that failure to seek medical aid contradicts claimant and does not support claim and prejudices employer's rights. 1—194.

Accident.—Where no prejudice shown, and employer had actual knowledge of accident within thirty days, failure to comply with Section 22 no bar to compensation. 1—479.

ACCIDENT.—Where rights of employer not prejudiced by lack of notice compensation will not be denied. 1—519.

FAILURE TO MAKE.—Employer's rights found not prejudiced by failure to report accident occurring on September 18 until December 26, 1929, where competent medical care was procured by employee and his condition prevented earlier reporting. 1—336.

FAILURE TO MAKE.—Where employer's rights have been prejudiced by failure to report accident, Compensation for injuries resulting in death denied. 1—349.

RESCUE

FURTHERING MASTER'S BUSINESS.—Where rescue is shown to be in the furtherance of the master's service the resulting accident arises out of employment. 1—65.

REVIEW

AFFIRMATION.—Where Hearing Commissioner's findings and conclusions are in accordance with evidence they will be adopted by Full Commission. 1—175.

AFFIRMED.—Where greater weight of evidence sustains findings of hearing Commissioner, full Commission will affirm hearing Commissioner's opinion. 1—88.

AFFIRMED ON.—Opinion and findings of hearing Commissioner affirmed. 1—49.

AFFIRMED ON.—Where evidence does not warrant change in findings of fact and where conclusions of law are sound and correctly stated hearing Commissioner's findings and conclusions will be adopted by full Commission. 1—172.

AFFIRMED ON.—Where full Commission finds nothing justifies alteration or amendment of opinion of hearing Commissioner, such opinion will be adopted by the full Commission. Hearing Commissioner's opinion and findings of fact adopted. 1—61.

MODIFICATION.—Full Commission finds award for facial disfigurement excessive, reducing same from $750.00 to $500.00. 1—101.

NECESSITY TO APPEAR.—Where appeal is not frivolous and made in sincerity, party appealing must make an appearance before Commission or file brief to support grounds of appeal. 1—472.

REVERSED ON.—Where evidence does not sustain findings of single Commissioner, award directing dismissal of case. 1—477.

REVERSED ON.—Where evidence shows hernia met five requirements, Hearing Commissioner's opinion denying compensation is reversed. 1—505.

SAFETY APPLIANCES

WILFUL REFUSAL TO USE.—Where evidence does not sustain allegation wilful refusal to use safety appliances ten per cent reduction compensation disallowed. 1—156.

SAME BUSINESS OR ESTABLISHMENT

DEFINED.—Where one business is conducted on the same premises, under one roof, the employees being interchangeable, and five or more employed this brings the employer within the Act. 1—497.

SCHOOL DISTRICT

LIABILITY OF.—Employee of a joint local school district is as such an employee of the County School Boards of the two Counties jointly operating and owning the school. 1—264.

SECOND INJURY

RESULTING FROM FIRST.—Where second injury result of first compensation allowed for second injury. 1—150.

SHOT

By hunter.—Stray shot from hunter's gun striking employee on highway while at work, resulting loss of eye held to be an accident arising out of and in the course of the employment. 1—393.

SPECIFIC DISABILITY

Finger.—Loss of "more than" one phalange very clear and entitles claimant to loss of finger where there is a loss of "more than" one phalange. 1—170.

Fingers.—Loss of one and one-quarter phalanges of a finger is "loss of more than one phalange" and "considered as loss of the entige finger. 1—82.

Fingers.—Loss of one and one-third phalanges of a finger is "loss of more than one phalange" and "considered as loss of the entire finger." 1—83.

Hand and fingers.—Where it is shown that the plaintiff has lost the distal part of the first phalange of the index finger, and the three other fingers at the proximal part of the first phalange and posterior part of hand crushed, the thumb being uninjured, award will be the proportion of loss of use of the hand. In this particular case four-fifths of loss of use of hand was awarded. 1—50.

Phalange.—Loss of "more than" one phalange does not require finding that substantial loss of use of entire finger to entitle claimant to compensation for loss of entire finger. 1—177.

Temporary total and specific.—Claimant entitled to compensation, Section 29, until termination of disability thereafter to specific compensation for loss of phalanges. 1—247.

Temporary total and specific.—Claimant entitled to compensation under Section 29 until termination of temporary total disability and thereafter. 1—249.

Temporary total and specific.—Compensation allowed for period of temporary total disability in addition to specific under Section 31 (g). 1—238.

Temporary total and specific.—Section 29 provides for compensation during total disability upon termination specific compensation awarded for loss of fingers. 1—242.

Temporary total followed by specific.—Section 29 provides without exception for total disability not to exceed 400 weeks, compensation thereunder must be paid until total disability terminates. Thereafter, in cases of specific total partial disability under Section 31, disability will be deemed to continue for periods stated, subject to maximum periods and payments provided under the Act. 1—232.

Total disability.—Where injury totally disables printer from following his life's vocation but only consists of loss of use of the left hand, Section 31 only remedy and compensation payable only for loss of use of hand. 1—436.

STREET RISKS

To work.—Employee injured travelling in own automobile from home to employer's place of business to report for day's work, although carrying employer's money, not entitled to compensation. 1—207.

STEPPING ASIDE

Abandonment of employment.—Where employee abandons employment to indulge in roller skating, claim denied. 1—510.

Condoned by employer.—Where employer condones and encourages doffer boys to leave building during idle periods in the course of the employment and injury to an employee resulting from a fall to the ground while raising himself from a sitting position on a platform outside the building the injury arises out of the employment. 1—298.

Direction employer.—Where course of employment departed from under direction of a superior with authority over him, the departure cannot be imputed to the injured person. 1—409.

PRESENCE OF EMPLOYER.—Where evidence sustains Hearing Commissioner's finding that injury occurring while employee was performing work in presence of one of officials of the Company, although not the work he was hired to perform arose out of employment, when on review, will be affirmed by Full Commission. 1—482.

VOLUNTARY ABANDONMENT OF WORK.—Employee voluntarily abandoning or stepping aside from employment and receiving injuries not entitled to compensation. 1—314.

VOLUNTARY ABANDONMENT WORK.—Where a servant voluntarily departs from assigned duties, or leaves the work to do something for which he was not engaged there is no contractual relation and, the employment is temporarily suspended. Injuries sustained where employment voluntarily abandoned not compensable. 1—317.

WHERE USEFUL TO MASTERS.—Where workman intervenes and does something useful or helpful to the master, although outside the special duties of employment, the legislature intended language to cover broader scope and not limit right to compensation to injuries sustained "when doing the work he was employed to perform." 1—420.

SUBROGATION

EMPLOYER'S RIGHT TO.—Where agreement for compensation has been made and approved by the Commission and the employee compromises with the third party responsible for the injuries, the employer is entitled to have such compromise settlement allowed as a credit or offset to compensation payments, preventing double recovery. 1—270.

SETTLEMENT WITH THIRD PARTY.—Election to make settlement with third party causing disability prior to making claim for compensation bars right to compensation. 1—235.

TEMPORARY TOTAL DISABILITY

FACTS AS TO.—Award will be made consonant with facts found upon hearing. 1—141.

FOLLOWED BY SPECIFIC.—Amputation of member entitles claimant to compensation for temporary total disability under Section 29, and thereafter for specific compensation under Section 31, the latter not being *in lieu* of all other compensation. 1—341.

FOLLOWED BY SPECIFIC.—Under Section 29 compensation is payable during total disability and, in cases of amputation of member, upon termination of total disability the disability will be deemed to continue thereafter for periods provided in Section 31.

TERMINATION OF DISABILITY

CONCLUSIVE AS TO.—Where only positive evidence of termination of disability is undisputed evidence of claimant this is conclusive. 1—180.

MEDICAL EXAMINATION DETERMINES.—Where no evidence in record of termination of disability or a status of permanent loss of use prior to medical examination on date of hearing, this justifies termination as of that date. 1—184.

TESTICLE

LOSS OF.—Is a bodily disfigurement. 1—501.

LOSS OF.—Where no specific provisions made for loss of portion of body and no proof of impaired earnings. Claim denied for both disability compensation and disfigurement. 1—218.

TOTAL DISABILITY

TO FOLLOW USUAL TRADE.—Where injury totally disable printer from following his life's vocation but only consists of loss of use of the left hand, Section 31 only remedy and compensation payable only for loss of use of hand. 1—436.

TRAVELING SALESMAN

Returning from conference.—When called into conference by employer in distant town, later after having dinner with a friend and upon the return trip home, happens to an accident, about eight o'clock p.m., resulting injuries arise out of and in the course of the employment. 1—255.

UNPAID SPECIFIC

Unpaid award for.—Upon death from natural causes, unpaid award for specific loss of use payable to dependents, next of kin. 1—382.

VARICOCELE

Not accident.—Varicocele is a gradual development and does not appear suddenly. Varicocele complained of not of recent origin. Claim denied. 1—56.

VOLUNTEER FIREMAN

Average weekly wage.—Partial dependents awarded compensation based upon amount paid deceased as fireman by city. 1—334.

WILFUL ACTS

Necessary to find.—Case remanded by Supreme Court to find facts as to wilful intent to injure self (Conrad *v.* Cook-Lewis, Supreme Court). 1—465.

Of third parties.—Employee may recover for injuries caused by wilful acts of third person. 1—20.

Safety appliances.—Where evidence does not sustain allegation wilful refusal to use safety appliances ten per cent reduction compensation disallowed. 1—156.

Violation of rules.—Wilful violation of rules must be of rules approved by Commission. Wilful misconduct or refusal to comply with statute duty involves more than moral blame and conduct of quasi criminal nature, not ignorant failure to comply with statute. 1—359.

WORK SUITABLE TO CAPACITY.

Employer must furnish.—Where disability has been sustained employer must tender work suitable to capacity of injured employee or pay compensation for total disability until tender is made. 1—467.

When tendered.—Where employer tenders work suitable to the capacity of the injured, compensation ceases during such refusal. 1—487.

STATE LIBRARY OF NORTH CAROLINA
3 3091 00840 1846